TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1904.

No. ~~211~~ 11.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED, PETITIONER,

vs.

MARY MEINERT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 19, 1904.
CERTIORARI AND RETURN FILED APRIL 22, 1904.

(19,275.)

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1902.

No. 945.

THE NEDERLAND LIFE INSURANCE COMPANY,
LIMITED,
Plaintiff in Error,

vs.

MARY MEINERT,
Defendant in Error.

MR. NATHAN MORRIS,
MR. LOUIS NEWBERGER,
MR. PHILIP W. FREY,
Counsel for Plaintiff in Error.

MR. ALBERT J. BEVERIDGE,
MR. L. A. WHITCOMB,
MR. G. K. DENTON,
Counsel for Defendant in Error.

Error to the Circuit Court of the United States for the District of Indiana.

(19,275.)

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vs.

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2 Pleas of the Circuit Court of the United States for the District of Indiana, begun and holden at the United States Court House in the City of Indianapolis, in said District on the first Tuesday in May in the year of our Lord one thousand nine hundred and two before the Honorable John H. Baker, Judge of the District Court of the United States for the District of Indiana and ex-officio Judge of said Circuit Court.

Mary Meinert,
vs.
The Nederland Life Insurance Company, Limited.
} Civil Action No. 10,032.

Be it remembered that heretofore towit: at the November Term of said Court, on the 3rd day of December, 1901, before the Honorable John H. Baker, Judge of said Court, the following proceedings in the above entitled cause were had towit:

Comes now the plaintiff by her Attorneys, and files an Amended Complaint herein, by leave of Court, in the words following towit:

The plaintiff complains of the defendant and says:

That it is now and was on the 5th day of March, 1896, a corporation duly organized and incorporated and engaged in the business of life insurance.

That on the 5th day of March, 1896, the plaintiff and her insured, William Meinert, paid to the defendant the sum of one hundred and one ($101) dollars as a premium for a policy of insurance upon the life of said William Meinert, in consideration whereof the defendant executed and delivered to the plaintiff a policy of life insurance upon the life of said William Meinert, wherein and whereby the said defendant agreed to pay the plaintiff the sum of Five thousand ($5000) dollars within thirty days after proofs of death of the said William Meinert had been received by the defendant, a copy of which policy is filed here with, marked "Exhibit A", and is hereby made a part hereof.

4 That the application for said policy of insurance is by the terms of said policy made a part of the contract of insurance, and that said application provides that the place of said contract shall be the principal office in the United States of said Company in the City of New York, and that the contract of insurance contained in said policy and in said application shall be governed by the laws of the State of New York.

That a copy of said application is filed herewith, marked "Exhibit B", and is hereby made a part hereof.

That the said William Meinert died on the 24th day of March, 1900, at Evansville, Indiana.

That at the time said policy was issued and until, his death, plaintiff was the wife of said William Meinert, and had a valuable interest in his life.

That the plaintiff has performed all the conditions of said policy and contract of insurance on her part to be performed, and the said

William Meinert performed all the conditions of said policy and contract on his part to be performed.

That the defendant has not paid said sum of $5000 or any part thereof and the same was due on the 24th day of March, 1900 and is now due, together with six per cent interest from said date.

That on the 5th day of March, 1897, the defendant wrongfully cancelled said policy of insurance, and thereafter, on the 3rd day of April, 1897, notified this plaintiff and the insured that said policy was null and void.

That after the death of the said insured, the plaintiff notified the said defendant, and requested blanks upon which to make out proofs of death, but the defendant failed to furnish the same and denied all liability under said policy of insurance on the ground that said policy had been cancelled, as above stated, on the 5th day of March, 1897.

Wherefore plaintiff demands judgment for Six thousand
5 ($6000) dollars and all other proper relief.

G. K. DENTON,
ALBERT J. BEVERIDGE and
LARZ A. WHITCOMB,
Attorneys for Plaintiff.

EXHIBIT A.

No. 58021. Age 47.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED.

United States Branch
874 Broadway
New York City

Board of Trustees:

J. Crosby Brown,
Amos T. French,
John D. Keiley, Jr.,
James Brown Potter,
Chas. E. Whitehead.

President and General Manager:
Louis I. Duburcq, LL. D.

Combined Term and 15 Limited Payment Life Insurance.

Amount Insured
$5000

Quarterly Premium.
During first Five Years $25.25

During following 15 years
$64.25

ESTABLISHED IN AMSTERDAM, (HOLLAND) 1858: AUTHORIZED TO CARRY ON BUSINESS IN THE STATE OF NEW YORK AUGUST 15TH, 1893.

In consideration of the application for this policy of insurance, which is part of this contract, and each of the statements made therein, and in further consideration of the payment of the quarterly premiums of twenty five dollars and twenty five cents, to be made at its branch office in the City of New York on or before the fifth day of March-June-September-and-December, in each successive year during the five years from the date hereof, and the further payment of sixty four dollars and twenty five cents, to be made at the said office on or before the said dates above mentioned during the sixth and each of the following fourteen years of this contract, or until the previous death of the insured, should his death occur before the expiration of the above specified period,

Does promise to pay to Mary Meinert, wife of the insured, or if she shall not then be living to the insured's executors, administrators or assigns the sum of five thousand dollars, (any indebtedness to the Company on account of this contract to be first deducted therefrom) at the said branch office in the City of New York,
6 within thirty days after satisfactory proofs of the death of William Meinert of Evansville in the County of Vanderburgh, State of Indiana, (herein called the insured) shall have been re-

ceived and approved by the Company, at its said branch office; provided however that this policy is issued and accepted under and subject to the provisions and requirements printed or written upon the back of this policy which shall be taken to be a part of this contract, as fully as if they were set forth at length on the face of this policy and signed by the parties.

In the event of the death of the insured after one year from the day of its issue, this policy shall be incontestable, provided the written statements made by the applicant, and upon which this policy is issued, contain no intentional misstatement, and provided the provisions of this policy as to the payment of premiums, military and naval service, and adjustment for incorrect age, be complied with.

Notice is hereby given that the provisions of Section 88 of the Insurance law 1892 of the State of New York are waived by the Provisions and Requirements referring to this policy.

In witness whereof the Nederland Life Insurance Company Limited, has caused this policy to be issued and signed by the president and secretary of the branch office in its name, at the branch office in the City of New York, on the fifth day of March in the year one thousand eight hundred and ninety six.

(Signed) L. I. DUBOURCQ,
President.

(Signed)
Secretary.

Examined:
W.-

(Copy)

PROVISIONS AND REQUIREMENTS.

Payment of premiums.

Article 1. (a) All premiums are due and payable at the branch office of the company;, in the City of New York, on the dates fixed in the policy, for which receipts will be given signed by the president and treasurer.

(b) Agents and other persons may be authorized to collect the premiums and to deliver receipts for same, (signed as stated above), but no receipt so given shall be valid unless countersigned by the persons so authorized. No payments made by any person, except in exchange for such receipt, will be reconized by the Company.

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(c) The annual premium if desired, may be divided into half-yearly, or quarterly installments, in which case, however, interest will be added to such premium at the rate of five per cent (5%) per annum.

(d) The premium for the current year, or any portion thereof, not paid at the death of the insured shall be deducted from the amount payable on the policy.

Grace. Article II. In case of non-payment of any annual premium or installment thereof, within thirty days after the same shall fall due, this policy shall be null and void, subject however to the provisions as to cash surrender and paid-up policy values. The Company will, however, as a matter of favor and not of right, mail notice to the insured or assignee, at the last address furnished by him or them to the Company, to the effect that the policy may be re-established by the payment of the annual premium or installments thereof still due, within ten days after mailing said notice.

Age. Article III. If it is found that the age of the insured was understated in his application, the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

Occupation or Employment. Article IV. (a) The risk of death within one year from the date of issue of this policy, while serving on any steamer or other vessel, or in consequence of duelling or violation of law, or engagement in any occupation or employment specially hazardous, viz: handling of electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, arctic explorations, the manufacture or handling of explosives, service upon any railway train, or in switching or coupling cars, is not assumed by the Company.

(b) In the event of the death of the insured during military or naval service in time of war, unless a written permit has been previously given by the president of the branch office of the Company in the City of New York, the Company will only be liable for the amount of the full reserve of the policy.

Suicide.

Article V. In case of suicide of the insured, whether sane or insane, within a period of one year following the date of issue of this policy, the Company shall not be liable to pay the amount insured.

Cash Surrender Value. Paid-up Insurance.

Article VI. Surrender for cash or conversion of this policy into a paid up policy, is allowed on the application of the insured or the assignee, in accordance with the schedule printed or written in this policy, provided such application is made within six months after due date of the annual premium, or installment thereof remaining unpaid.

Loans.

Article VII. (a) The insured may obtain a loan or advance, not exceeding the cash surrender value of this policy on the payment of interest at the rate of five per cent (5%) per annum, payable yearly in advance. Should the interest not be paid when due, the policy will become null and void, and the Company will only return the amount of its surrender value, after having deducted the amount due for sums loaned or advanced with interest thereon to date of payment.

8

(b) Applications for loans must be forwarded to the Company's branch office in the City of New York on blanks provided by the Company, together with this policy, which, in case, the loan is granted shall be assigned to the Company as collateral security, and deposited in the branch office of the Company in the City of New York.

Assignments.

Article VIII. Assignments must be made out in duplicate, on blanks provided by the Company, and forwarded to the Company's branch office in the City of New York. The Company will return one of the assignments and keep the duplicate on record. Assignments to be effective must be lodged with the Company at its branch office in the City of New York, In no case does the Company assume any responsibility for the validity of an assignment.

Alterations in the policy

Article IX. (a) Applications for alterations in the policy must be forwarded to the Company's branch office in the City of New York, together with the policy, on which such alteration shall be endorsed.

(b) All agreements made by the Company must

be in writing signed by two of its executive officers, and no agent or other person is empowered to alter or waive any of the conditions of this policy or issue permits of any kind or make any agreement binding upon the Company.

Claims. Article X. This Company shall not be liable to make any payment on this policy unless proofs of the death of the insured, and of all other facts upon which the liability of the Company depends, be furnished to it at its branch office in the City of New York, in form satisfactory to the Company, within one year after the death of the insured.

EXHIBIT B.

(Copy)

1. COPY OF APPLICATION.

1. Amount to be insured $5000. (Premiums payable quarterly.
2. On what plan? Combined Term & 15 yrs. Ltd. Payment.
3. Name in full of the person whose life is to be insured? William Meinert.
4. A. Residence? City or Town. Evansville. County Vanderburgh. State Indiana.
   B. Give address where notices may be sent. 217 Law Ave.
5. A. Profession, occupation or employment? (State particular branch of business or trade.)

   Proprietor Brick Yard.

   B. If applicant is a married woman also state profession or employment of husband.
6. Place and date of birth? A. Place Pries Minton County of West Phalio State of Germany.
   B. Day 7" Month July Year 1848.
   7. Whether Married or single? Married.
9 8. A. Have you any other insurance on your life? No.
   B. If so, when taken, with what Company or Associations, and for what amounts?
9. Is your life now being proposed to any other Company or Association? No.
10. Has any application to insure your life ever been declined or postponed? If so, by what Companies or Associations? No.

11. A. To whom is the insurance applied for payable in event of death? Mary Meinert.
    B. If application is for an endowment policy, to whom is the endowment payable at its maturity?
12. A. State relationship of beneficiary. If not a relation, give your reasons for insuring your life. Wife.
    B. Present residence of beneficiary? 217 Law Ave, Evansville, Ind.
13. Give names and residences of two friends (for identification) Jacob Schweitzer, Peter Detroy.

I do hereby declare that each and every of the statements made by me in the foregoing application are true and correct, whether writtehn in my own hand or not, and I hereby agree that this declaration, together with the said statements and those made by me on the Medical Examiner's Certificate shall be the basis of the plicy of insurance to be drawn up under the provisions and requirements in force with the Company at the date of my signing this application, which provisions and requirements will be printed and written on the policy applied for, and which provisions and requirements are hereby accepted as binding upon me in like manner as if the same were set forth in full in this application; and that if any untrue averment is contained in this declaration, or in the said statement or certificate, or if it shall hereafter appear that any material information has been withheld, then the said policy shall be null and void, and all moneys which shall have been paid on account of the insurance shall be absolutely forfeited to the Company. I further agree that any policy which may be issued under this application shall not be in force until the actual payment and acceptance of the premium by said Company, or its duly authorized agent, during my life time and good health, and that the contract of insurance contained in the policy and in this application shall be governed by the laws of the State of New York, the place of said contract to be the principal office in the United States of said Company in the City of New York.

Dated at Evansville, Ind. this 29 day of February, 1896.

Witness:

Signed H. Loewenthal & Co.
General Agents.
(Signed) William Meinert.
(Signature of person applying for insurance on his or her life)

COPY OF THE STATEMENT MADE BY THE APPLICANT.

IN THE MEDICAL EXAMINER8S CERTIFICATE.

1. A. Name in full? A. William Meinert
   B. Age? Give year, month and day of birth? B. 47 year 1848, month July. day 7th
   C. Nationality? C. German.
   D. Occupation or employment? D. Brick Maker.
   E. what have been your occupations in the past? E. Since boyhood same.
   F. Are you now, or have you ever been either directly or indirectly, concerned in either the manufacture or sale of any kind of alcoholic beverage? F. No.
2. A. Where is your residence? How long have you lived at prsent residence? A. Evansville, Ind.
10 B. Do you intend to change your residence? If so, to what place, and for what reason? B. No.
   C. Where did you live before? When? How Long? Why did you make a change? C. Prussia.
   D. Have you at any time resided beyond the limits of the United States? Where? D. Prussia until 15″ year.
3. A. What is the name and address of your medical attendant, or that of your family?
   (The family or personal physician is not allowed to make this examination) A. Th. Schultz, Evansville, Ind. Family physician.
4. A. What physicians have you consulted here or elsewhere? When? For what complaints? A. None.
   B. Have you ever visited a watering place, or used medicinal waters for your health? B. No.
5. A. What is your present health? A. Good.
   B. Have you any deformity? B. No.
   c. How is your appetite? Digestion? How do the bowels act? C. Good. Good. Regularly daily.
   D. What illnesses have you had during chidhood and the last ten years? (any desease of the throat, lungs or chest, palpitations of the heart, fainting fits, epilepsy, gout, hemorrage rheumatism, haemorrhoids, varicocele, tumors, growth of any kind, hernia, gravel, cramps, stricture, syphilis, any disease of the kidneys, paralysis, wounds, external injuries, or any operations upon the body, discharge from the ear, dizziness? D. No.

6. A. Is it your habit to use spirits, wine, malt liquors, beer or other alcoholic beverages? If so, state exactly what quantities you use daily? A. Don't drink any.

B. Are you now, or have you ever been in the habit of taking opium, morphine, choral, sulphanol, cocoa, cocaine, bromide, of potash, antipyrine, or any other narcotic drug? B. No.

c. Do you use tobacco? If so, what form, and how much daily? C. Chew 10c——2 weeks do not smoke.

7. Family History.

	Living		Dead	
	Age	Health	Age	Specific cause of death.
Father	78	Good		
Father's Father				
Father's Mother				Both died in Germany, do not know cause of death—I think they lived to about 70 year
Mother			33	Childbed fever. Short time.
Mother's Father		about 70	Do not know	Both died.
Mother's Mother		65 to 70		in Germany.
	53	Good		
Brothers Three	51	Good		
	44	Good.		

Sisters None.

A. Has there ever been any cause of Consumption, insanity, inebriety or paralysis in your family, or in your immediate or collateral ancestors? A. No.

B. How many childeren have you? What are their ages? If any have died, at what age did this occur, and what was the cause? B. One 10 years. None have died.

8. A. Have you ever been rejected for military service? If so, when and for what reason? A. No.

Have you been a pensioner? If so, when and for what? B. No.

C. Have you recently gained or lost in weight? If so, how much? C. No.

STATEMENT OF APPLICANT.

I have answered the above questions to the best of my knowledge, truthfully and without any concealment, knowing that they form, together with the application, the basis of a policy for life insur-

ance which shall, be null and void if any of the statements given by me above should be untrue.

(Signed) WILLIAM MEINERT.

11 The above is an exact reproduction of the wording of the original application and of part 1. of the medical examiner's certificate.

And the defendant is ruled to answer herein within 15 days.

And afterswards towit at the November Term of said Court, on the 12th day of December, 1901, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had towit:

Comes now the defendant by William W. Frey, Esq., its Attorney, and files its Answer herein in the words following to-wit:

Paragraph 1.

The defendant, The Nederland Life Insurance Company, Limited, for answer to the plaintiff's amended complaint herein, denies each and every allegation therein contained.

Paragraph 2.

The defendant, The Nederland Life Insurance Company, Limited, for a further and second paragraph of answer to the amended complaint of the plaintiff herein, avers.

That it admits the execution of the policy of life insurance set out in the amended complaint of the plaintiff, but it avers that in consideration of the issuing on the 5th day of March, 1896, of the policy sued on the plaintiff agreed to pay to said defendant on the 5th day of each March, June, September and December of each of the five years succeeding the said year of 1896 the sum of twenty five dollars and twenty five cents ($25.25)

That among other provisions in said policy which form a part of the contract sued on herein is the following:

"Article II. In case of non-payment of any annual premium or installment thereof, within thirty days after the same shall fall due, this policy shall be null and void."

That the premium on said policy, according to the terms
12 thereof, became and was due on the 5th day of March, 1897, and that plaintiff failed to pay same at maturity and the same still remains unpaid, by reason of which non-payment the policy sued on herein became, was and is null and void and of no effect.

Paragraph 3.

The defendant, The Nederland Life Insurance Company, Limited, for a further and third paragraph of answer to the amended complaint of the plaintiff herein, avers:

That it admits the execution of the policy of life insurance set out in the amended complaint of the plaintiff, but it avers that in consideration of the issuance and delivery thereof, on the 5th day of March, 1896, the plaintiff agreed to pay to said defendant on the 5th day of each March, June, September and December of each of the five years succeeding the said year of 1896 the sum of twenty five dollars and twenty five cents ($25.25); that among other provisions in said policy and as a part thereof there is the following.

"In case of non-payment of any annual premium, or installment thereof, within thirty (30) days after the same shall fall due, this policy shall be null and void, subject, however, to the provisions as to cash surrender and paid up policy values".

That by the terms of said policy a premium on said policy became and was due on the 5th day of March, 1897, but plaintiff failed to pay same at maturity and the same still remains unpaid; that said policy had not been assigned by said William Meinert, the person insured, to any other person; that on the 15th day of February, 1897, the said 15th day of February, 1897, being more than fifteen (15) days and not more than forty five (45) days prior to the date when said last mentioned installment of premium was, by the terms of said policy, payable, the said defendant Com-
13 pany sent to William Meinert, the insured in said policy, an envelope upon which the pistage necessary to its transmission in the United States Mails to its addressed destination had been prepaid by the defendant Company; that the said envelope was addressed and mailed to the last known post office address of the said William Meinert and that said envelope so addressed and mailed, with postage thereon so prepaid, contained a written and printed notice, of which the following is a copy:

#337. NEDERLAND LIFE INSURANCE CO. (LD.)
Established in Amsterdam (Holland) 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the Company, or to a person authorized to collect such premium, holding the Company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ,
President U. S. Branch.

Mr. William Meinert,
217 Law Avenue,
Evansville, Ind.

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (LD.)

(Over)

14 ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No.....Street.....Name Post Office.....
County of.....State of.....
Name .....

That the said William Meinert failed to pay said premium of twenty five dollars and twenty five cents ($25.25) on the 5th day of March, 1897, and failed to pay the same within the time in said notice stated and that the same still remains unpaid; that on the 22nd day of April, 1897, that being more than thirty (30) days after the mailing of the notice aforesaid, the defendant Company declared said policy forfeited and lapsed.

That the provisions of the insurance law of the State of new York with reference to the surrender value of lapsed or forfeited policies, being Section 88 of the Insurance Law of the State of New York, were waived by the said plaintiff, William Meinert, and that the policy of insurance sued on herein, a copy of which is filed with the amended complaint and marked "Exhibit A" and which exhibit is referred to as a part of this answer, was accepted by the said William Meinert with the following provision, towit:

"Notice is hereby given that the provisions of Section 88 of the Insurance Law 1892 of the State of New York are waived by the provisions and requirements referring to this policy."

15 printed in red ink on the margin of the face of the policy when issued.

Wherefore, the said policy became lapsed and forfeited, null, void and of no effect and all premiums previously paid on said policy became forfeited to the Company.

Wherefore the defendant demands judgment.

PHILIP W. FREY,
Attorney for defendant.

16 And afterwards towit at the November Term of said Court, on the 17th day of December, 1901, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had towit:

Comes not the plaintiff by counsel and files her Demurrer to the 2nd and 3rd paragraphs of answer herein in the words following towit:

The plaintiff demurs severally to the second and third paragraphs of the defendant's answer on the ground that neither of said paragraphs states facts sufficient to constitute a cause of defense to plaintiff's complaint.

G. K. DENTON,
ALBERT J. BEVERIDGE and
LARZ A. WHITCOMB,
Attorneys for Plaintiff.

And afterwards towit at the November Term of said Court, on the 28th day of December, 1901, in Recess thereof, the following further proceedings in the above entitled cause were had towit:

Comes now the defendant by counsel and files its motion and stipulation herein in the words following towit:

The defendant now here asks leave of court to amend the second and third paragraphs of answer to the amended complaint herein by inserting in each of said paragraphs, after the words "complaint of the plaintiff" on the fifth line of said answers and before the words "but it avers" the following:

"avers that the same was delivered and the first premium paid thereon in the State of Indiana."

PHILIP W. FREY,
Attorney for Defendant,

In respect to the above counsel for plaintiff stipulates with counsel for defendant that the above amendment may be made and that it may on the argument of the demurrers to the answer be considered as so amended.

G. K. DENTON,
Attorney for Plaintiff.
PHILIP W. FREY,
Attorney for defendant.

17 And afterwards, towit, at the November Term of said Court on the 18th day of January, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit:

Comes now the defendant by Philip W. Frey and Morris and Newberger its Attorneys, and files its 4th and 5th paragraphs of answer herein, in the words following towit.

Paragraph 4.

The defendant, The Nederland Life Insurance Company, Limited, for a further and fourth paragraph of answer to the amended complaint of the plaintiff herein, avers:

That it admits the execution of the policy of life insurance set out in the amended complaint of the plaintiff, but it avers that, in consideration of the issuance and delivery thereof, on the 5th day of March, 1896, the plaintiff agreed to pay to said defendant on the 5th day of March, June, September and December of each of the five years succeeding the said year of 1896, the sum of twenty five dollars and twenty five cents ($25.25); that among other provisions in said policy and as part thereof, there is the following:

"In case of non-payment of any annual premium, or installment thereof, within thirty (30) days after the same shall fall due, this, policy shall be null and void,, subject, however, to the provisions as to cash surrender and paid up policy values".

That by the terms of said policy, a premium on said policy became and was due on the 5th day of March, 1897, but plaintiff

failed to pay same at maturity and the same still remains unpaid; that said policy had not been assigned by said William Meinert, the person insured, to any other person; that on the 15th day of February, 1897, the said 15th day of February, 1897, being more
18 than fifteen (15) days and not more than forty five (45) days prior to the date when said last mentioned installment of premium was, by the terms of said policy, payable, the said defendant company sent to William Meinert, the insured in said policy, an envelope upon which the postage necessary to its transmission in the United States mails to its addressed destination had been prepaid by the defendant company; that the said envelope was addressed and mailed to the last known post office address of the said William Meinert, and that said envelope so addressed and mailed, with postage thereon so prepaid, contained a written and printed notice, of which the following is a copy:

"337.

NEDERLAND LIFE INSURANCE CO. (LD.)
Established in Amsterdam (Holland), 1858.
United States Branch.
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the company, or to a person authorized to collect such premium, holding the company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ,
President U. S. Branch.

Mr. William Meinert,
217 Law Avenue,
Evansville, Ind.

I

If payment is made to the Company direct, it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Company (LD).

(Over)

ATTENTION.

No payment of premiums made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittances to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No.....Street &&.....Name Post Office.....

19 County of....., State of.....

Name .....

That said William Meinert failed to pay said premium of twenty five dollars and twenty five cents ($25.25) on the 5th day of March, 1897, and failed to pay the same within the time in said notice stated, and that the same still remains unpaid; that on the 22nd day of April, 1897, that being more than thirty (30) days after the mailing of the notice aforesaid, the defendant company declared said policy forfeited and lapsed.

That the provisions of the Insurance Law of the State of New York with reference to the surrender value of lapsed or forfeited policies, being section 88 of the Insurance Law of the State of New York, were waived by the said plaintiff, William Meinert, and that the policy of insurance sued on herein, a copy of which is filed with the amended complaint and marked "Exhibit A", and which exhibit is referred to as a part of this answer, was accepted by the said William Meinert with the following provision, towit:

'Notice is hereby given that the provisions of section 88 of the Insurance Law 1892 of the State of New York are waived by the provisions and requirements referring to this policy",

printed in red ink on the margin of the face of the policy when issued.

That among the insurance laws of the State of New York is Section No. 92 thereof, as amended in the year 1897, and which from that date has been and still is the law of the State of New York, the same reading as follows:

"No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment of interest, declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment or monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest, or installment of any portion thereof required by the terms of the

policy to be paid within one year from the failure to pay such premium, interest or installment, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen (15) and not more than forty five (45) days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited, and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice,. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium installment, interest or portion thereof for which it is claimed that forfeiture ensued".

That more than one year has elapsed since the default in the payment of the premium, as aforesaid, and more than one year has elapsed since the defendant declared the said policy to be forfeited by reason thereof, and more than one year has elapsed since the default was made in paying the premium, as aforesaid.

Wherefore the said plaintiff is not now entitled to have and maintain this action against the defendant upon said insurance policy, or any action in relation thereto.

P. W. Frey.
Morris and Newberger,
Att'ys. for def't.

Paragraph 5.

The defendant, The Nederland Life Insurance Company, Limited, for a further and fifth paragraph of answer to the amended
21 complaint of the plaintiff herein, avers.

That it admits the execution of the policy of life insurance set out in the amended complaint of the plaintiff,, but it avers that, in consideration of the issuance and delivery thereof, on the 5th day of March, 1896, the plaintiff agreed to pay to said defendant on the 5th day of March, June, September and December of each of the five years succeeding the said year of 1896 the sum of twenty five dollars and twenty five cents ($25.25); that among other provisions in said policy and as part thereof, there is the following.

"In case of non-payment of any annual premium, or installment thereof, within thirty (30) days after the same shall fall due, this policy shall be null and void, subject, however, to the provisions as to cash surrender and paid up policy values".

That by the terms of said policy, a premium on said policy became and was due on the 5th day of March, 1897, but plaintiff failed to pay the same at maturity, and the same still remains unpaid; that said policy had not been assigned by said William Meinert, the person insured, to any other person; that on the 15th day of February, 1897, the said 15th day of February, 1897, being more than fifteen (15) days and not more than forty five (45) days prior to the date when said last mentioned installment of premium was, by the terms of said policy, payable, the said defendant company sent to William Meinert, the insured in said policy, an envelope upon which the postage necessary to its transmission in the United States Mails to its addressed destination had been prepaid by the defendant company; that the said envelope was addressed and mailed to the last known post office address of the said William Meinert, and that said envelope so addressed and mailed, with postage thereon so prepaid, contained an written and printed notice, of which the following is a copy:

22 "337.

NEDERLAND LIFE INSURANCE CO. (LD.)

Established in Amsterdam (Holland), 1858.

United States Branch.

874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly pre-

mium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the Company, or to a person authorized to collect such premium, holding the company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ.
President U. S. Branch.

Mr. William Meinert,
217 Law Avenue,
Evansville, Ind.

If payment is made to the company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.
No.....Street.....Name Post Office.....
County of....., State of.....
Name .....

That said William Meinert failed to pay said premium of twenty five dollars and twenty five cents ($25.25) on the 5th day of March, 1897, and failed to pay the same within the time in said notice stated, and that the same still remains unpaid; that on the 22nd day of April, 1897, that being more than thirty (30) days after the mailing of the notice aforesaid, the defendant company declared said policy forfeited and lapsed.

That the provisions of the insurance law of the State of New
23 York with reference to the surrender value of lapsed or forfeited policies, being section 88 of the Insurance Law of the State of New York, were waived by the said plaintiff, William Meinert, and that the policy of insurance sued on herein, a copy of which is filed with the amended complaint and marked "Exhibit A", and which exhibit is referred to as a part of this answer, was

ccepted by the said William Meinert with the following provision, owit:

"Notice is hereby given that the provisions of Section 88 of the nsurance Law 1892 of the State of New York are waived by the rovisions and requirements referring to this policy."

rinted in red ink on the margin of the face of the policy when ssued.

That neither the said William Meinert, nor any one on his behalf, ever paid or offered to pay any premium, or any part of any premium, due or to become due or payable on said policy, except he premiums for the first year ending March 5th, 1897, and did ot pay or offer to pay the premium due on March 5th, 1897, for he failure to pay which said policy was declared forfeited, as hereinbefore set forth, nor any of the other premiums, payable within he period ending March 5th, 1898, nor any of the premiums payable within the period ending March 5th, 1899, nor any of the premiums payable within the period ending March 5th, 1900, nor did the said William Meinert at any time prior to his death, towit; March 24th, 1900, pay or offer to pay any of the premiums upon said policy of insurance due and payable at any of the times and dates aforesaid and up to the time of his death.

That said William Meinert well knew that default had been made by him in the payment of each and every of such premiums and the whole thereof due on said policy subsequent to said first annual premium, and never at any time in his life time paid or offered to pay any premiums, or any part of a premium, due upon said policy as aforesaid.

24 That the said defendant entered the said policy upon its books as forfeited and lapsed for failure to pay the quarterly premium due on said policy on the 5th day of March, 1897, and the said William Meinert was at all times advised that the defendant had so treated his said policy as lapsed and forfeited, and notwithstanding notice was given to him, as hereinbefore set forth, and notwithstanding said William Meinert was at all times advised that he had not paid said premium due on March 5th, 1897, he consented to the forfeiture and termination of said policy of insurance, and with the mutual knowledge and understanding on the part of the defendant and said William Meinert, the said policy was at all times by the said parties deemed terminated from and after, towit, the .... days of April, 1897; that relying upon said knowledge and mutual understanding this defendant never subsequently mailed or served any notice of the due-date of premiums to or upon said William Meinert during his life time, and the said William

Meinert at all times knowing that the defendant was treating said policy as forfeited and lapsed, and at all times knowing that he had not paid or tendered payment of any premiums upon said policy subsequent to said first annual premium, acquiesced in and agreed to the said mutual understanding that the said policy was forfeited and lapsed from and after said .... day of April, 1897.

This defendant says that during the whole of the time from the due-date of said premium payable March 5th, 1897, and from and after his default in the making of payment thereof up to the time of his death, said William Meinert acquiesced in the forfeiture of said policy and entirely abandoned said insurance policy as an insurance contract, and both the said Meinert and this defendant treated and regarded the same as lapsed, forfeited, null and void and of no effect, and continued to so regard the same until the death of said Meinert.

25 Wherefore this defendant says that said policy became lapsed, forfeited, null and void and of no effect, and this defendant, therefore, demands judgment for its costs.

P. W. FREY,
MORRIS & NEWBERGER,
Att'ys for def't.

And afterwards, towit; at the November Term of said Court, on the 21st day of January, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

The Court having heard the argument of counsel and being sufficiently advised in the premises doth now sustain the demurrer of the plaintiff to the 2nd and 3rd paragraph of answer herein, to which ruling of the Court the defendant by its Attorneys now excepts.

And afterwards, towit; at the November Term of said Court, on the 22nd day of January, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the plaintiff by counsel and files her demurrer to the 4th paragraph of answer herein, in the words following towit:

The plaintiff herein demurs to the 4th paragraph of defendant's answer, for the reason that it does not state facts sufficient to constitute a cause of defence to plaintiff's complaint.

G. K. DENTON.
ALBERT J. BEVERIDGE.
LARZ A. WHITCOMB,
Attorneys for Plaintiff.

And afterwards, towit; at the November Term of said Court, on the 31st day of January, 1902, before the Honorable John
26 H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the plantiff by counsel and files her reply to the 5th paragraph of answer herein, in the words following, towit.

The plaintiff for a reply to the fifth paragraph of the defendant's answer herein, denies each and every allegation in said paragraph of answer contained.

G. K. DENTON.
A. J. BEVERIDGE.
LARZ. A. WHITCOMB.
Attorneys for Plaintiff.

And afterwards, towit; at the November Term of said Court, on the 5th day of March, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the defendant by counsel and files its sixth paragraph of answer herein in the words following towit.

Paragraph 6.

The defendant, The Nederland Life Insurance Company, Limited, for a further and sixth paragraph of answer to the amended complaint of the plaintiff herein, avers:

That it admits the execution of the policy of life insurance set out in the amended complaint of the plaintiff, but it avers that, in consideration of the issuance and delivery thereof on the 5th day of March, 1896, the plaintiff agreed to pay to said defendant on the

5th day of March, June, September and December of each of the five years succeeding the said year of 1896 the sum of twenty five dollars and twenty five cents ($25.25); that among other provisions in said policy and as a part thereof, there is the following:

"In case of non-payment of any annual premium, or install-
27 ment thereof, within thirty (30) days after the same shall fall due, this policy shall be null and void, subject, however, to the provisions as to cash surrender and paid up policy values".

That by the terms of said policy a premium on said policy became and was due on the 5th day of March,, 1897, but plaintiff failed to pay same at maturity, nor within thirty (30) days thereafter, and the same still remains unpaid; that said policy had not been assigned by said William Meinert, the person insured, to any other person; that on the 15th day of February, 1897, the said 15th day of February, 1897, being more than fifteen (15) days and not more than forty five (45) days prior to the date when said last mentioned installment of premium was, was, by the terms of said policy, payable, the said defendant company sent to William Meinert, the insured in said policy, an envelope upon which the postage necessary to its transmission in the United States mails to its addressed destination had been prepaid by the defendant company; that the said envelope was addressed and mailed to the last known post office address of the said William Meinert, and that said envelope so addressed and mailed, with postage thereon so prepaid, contained a written and printed notice, of which the following is a copy:

"337-9-96-SM.

NEDERLAND LIFE INSURANCE CO. (LD)
Established in Amsterdam (Holland), 1858.
United States Branch.
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy #58021 will fall due on the 5th day of March, 1897, if the policy be then in force. Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the Company, or to a person authorized to collect such premiums holding the Company's receipt therefor, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value of paid up policy.

L. I. DUBOURCQ,
President U. S. Branch.

This premium is payable to Loewenthal & Co. Evansville, Ind
28 Mr. William Meinert,
#217 Law Ave,
Evansville, Ind.

If payment is made to the company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld).

(Over)

(Over)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the uotice was not properly addressed, give changed address.

No.....Street.....Name Post Office.....
County of.....State of.....
Name .....".

That said William Meinert failed to pay said premium of twenty five dollars and twenty five cents ($25.25) on the 5th day of March, 1897, nor within thirty (30) days thereafter, and failed to pay the same within the time in said notice stated and that the same still remains unpaid; that on the 22nd day of April, 1897, that being more than thirty (30) days after the mailing of the notice aforesaid, the defendant company declared said policy forfeited and lapsed.

That the provisions of the Insurance Law of the State of New York with reference to the surrender value of lapsed or forfeited policies, being Section 88 of the Insurance Law of the State of New York, were waived by the said plaintiff, William Meinert, and that the policy of insurance sued on therein, a copy of which is filed with the amended complaint and marked "Exhibit A", and which exhibit is referred to as a part of this answer, was accepted by the said William Meinert with the following provision, towit.

"Notice is hereby given that the provisions of Section 88 of the Insurance Law 1892 of the State of New York are waived by the provisions and requirements referring to this policy,"

printed in red ink on the margin of the face of the policy when
29 issued.

Wherefore, the said policy became lapsed and forfeited, null,

void and of no effect and all premiums previously paid on said policy became forfeited to the company.

Wherefore the defendant demands judgment.

PHILIP W. FREY.
MORRIS AND NEWBERGER,
Att'ys for Def't.

And afterwards, towit; at the November Term of said Court, on the 19th day of March, 1902, before the Honorable Francis E. Baker and the Honorable John H. Baker, Judges of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the plaintiff by counsel and files her reply to the sixth paragraph of answer herein, in the words following towit.

The plaintiff, for a reply to the sixth paragraph of the defendant's answer herein denies each and every allegation in said paragraph of answer contained.

G. R. DENTON,
A. J. BEVERIDGE,
LARZ. A. WHITCOMB.
Attorneys for Plaintiff.

And afterwards, towit; at the November Term of said Court on the 25th day of March, 1902, before the Honorable Francis E. Baker and the Honorable John H. Baker, Judges of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the defendant by counsel and files its 7th paragraph of answer herein, in the words following towit.

Paragraph 7.

The defendant, The Nederland Life Insurance Company, Limited, for a further and seventh paragraph of answer to the amended complaint of the plaintiff herein, avers:

That it admits the execution of the policy of life insurance set out in the amended complaint of the plaintiff; but it avers that, in consideration of the issuance and delivery thereof on the 5th day of March, 1896, the plaintiff agreed to pay to said defendant on the 5th day of March, June, September, and December of each of

the five years succeeding the said year of 1896 the sum of twenty five dollars and twenty five cents ($25.25); that among other provisions in said policy and as a part thereof, there is the following:

"In case of non-payment of any annual premium, or installment thereof, within thirty (30) day after the same shall fall due, this policy shall be null and void, subject, however, to the provisions as to cash surrender and paid up policy values".

That by the terms of said policy a premium on said policy became and was due on the 5th day of March,, 1897, but plaintiff failed to pay same at maturity, nor within thirty (30) days thereafter, and the same still remains unpaid; that said policy had not been assigned by said William Meinert, the person insured, to any other person; that on the 15th day of February, 1897, the said 15th day of February, 1897, being more than fifteen (15) days and not more than forty five (45) days prior to the date when said last mentioned installment of premium was, by the terms of said policy, payable, the said defendant company sent to William Meinert, the insured in said policy, an envelope upon which the postage necessary to its transmission in the United States mails to its addressed destination had been prepaid by the defendant company; that the said envelope was addressed and mailed to the last known post office address of the said William Meinert, and that said envelope so addressed and mailed, with postage thereon so prepaid, contained a written and printed notice, of which the following is a copy:

31 "337-9-96-SM.

NEDERLAND LIFE INSURANCE CO. (LD)
Established in Amsterdam (Holland), 1858.
United States Branch.
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy #58021 will fall due on the 5th day of March, 1897, if the policy be then in force. Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the Company, or to a person authorized to collect such premium (holding the company's receipt therefor) the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value of paid up policy.

L. I. DUBOURCQ,
President U. S. Branch.

Mr. William Meinert,
#217 Law Ave.
Evansville, Ind.

If payment is made to the company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld).

(Over)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the company can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No.....Street.....Name Post Office.....
County of.....State of.....
Name .....

That said William Meinert failed to pay said premium of twenty five dollars and twenty five cents ($25.25) on the 5th day of March,, 1897, nor within thirty (30) days thereafter, and failed to pay the same within the time in said notice stated and that the same still remains unpaid; that on the 22nd day of April, 1897, that being more than thirty (30) days after the mailing of the notice aforesaid, the defendant company declared said policy forfeited and lapsed.

And that thereafter the said defendant company on the 3rd day of April, 1897, addressed and mailed to the last known post
32 office address of William Meinert, the insured herein, with the necessary postage for its transmission in the United States mails duly prepaid thereon, an envelope containing a certain notice which was and is in the words and figures following, towit:

364-12-'96, SM.

"NEDERLAND
LIFE INSURANCE CO., (LIMITED)
Established 1858, Amsterdam, Holland,
United States Branch,
874 Broadway, New York.

New York, April 3rd, 1897.

Wm. Meinert,
217 Law Av.
Evansville, Ind.

Dear Sir:—

The premium on your policy, which fell due on the 5th Mar. has not been paid and the policy is therefore null and void.

I beg to inform you however that if the same is paid within ten days your policy will be reinstated.

L. I. DUBOURCQ,
President.

Policy No. 58021.

Please consider this notice as not sent, if premium has been paid since according to the notice sent you".

That the provisions of the Insurance Law of the State of New York with reference to the surrender value of lapsed or forfeited policies, being section 88 of the Insurance Law of the State of New York, were waived by said plaintiff, William Meinert, and that the policy of insurance sued on therein, a copy of which is filed with the amended complaint and marked "Exhibit A", and which exhibit is referred to as a part of this answer, was accepted by the said William Meinert with the following provision, towit:

"Notice is hereby given that the provisions of Section 88 of the Insurance Law 1892 of the State of New York are waived by the provisions and requirements referring to this policy".

printed in red ink on the margin of the face of the policy when
33 issued; that notwithstanding the said William Meinert was duly notified by said first notice of the date upon which his premium would fall due, and that unless he should pay it in accordance with the conditions of his policy, namely, within thirty days from the fifth day of March, 1897, said policy would be forfeited; and notwithstanding also said notice of April 3, 1897, offering to reinstate said policy if the premium be paid within ten days from that date neither said William Meinert nor any one on his behalf did or would pay the premium or offer so to do either within said period or at time thereafter, but the same still remains unpaid; and the said William Meinert and this defendant from that time

on continuously have treated said policy as lapsed, and this defendant alleges the fact to be that the said policy thereupon did lapse and become of no force or effect and was not in force at the date of the death of said William Meinert.
Wherefore the defendant demands judgment.

PHILIP W. FREY.
MORRIS AND NEWBERGER,
Att'ys for def't.

And afterwards, towit; at the November Term of said Court on the 27th day of March, 1902, before the Honorable Francis E. Baker and the Honorable John H. Baker, Judges of said Court, the following further proceedings in the above entitled cause were had towit.

Comes now the plaintiff by counsel and files her reply to the 7th paragraph of answer herein, in the words following towit.

The plaintiff for a reply to the seventh paragraph of answer to plaintiff's amended complaint herein denies each and every allegation in said paragraph of answer contained.
34

G. K. DENTON.
A. J. BEVERIDGE.
LARZ. A. WHITCOMB.
Attorneys for Plaintiff.

And afterwards, towit; at the May Term of said Court, on the 6th day of May, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit:

Come now the parties by counsel and the defendant now withdraws the 5th paragraph of its answer herein. And the parties now file their waiver of jury herein in the words following, towit.

The parties hereby agree that the above entitled cause shall be submitted for trial by the Court without the intervention of a jury which is hereby waived.
May 6th, 1902.

MORRIS AND NEWBERGER,
P. W. FREY,
For def't.
G. K. DENTON,
ALBERT J. BEVERIDGE,
LARZ. A. WHITCOMB,
for Plaintiff.

And thereupon this cause now coming on to be tried is submitted to the Court without the intervention of a jury, and the Court having heard the evidence and argument of counsel doth now take the same under advisement.

And afterwards, towit; at the May Term of said Court, on the 30th day of June, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

This cause having been submitted to the Court for trial, the
35 parties hereto having filed an agreement in writing waiving the right to trial by jury, the Court finds the facts established by the evidence to be as follows.

1. On March 5th, 1896, the defendant, The Nederland Life Insurance Company, Limited, issued its policy of insurance for five thousand dollars to William Meinert, payable upon his death to his wife, Mary Meinert, the plaintiff herein, a true and correct copy of which said policy of insurance is filed with the complaint and is made a part thereof, under and pursuant to the statutes of the State of Indiana.

2. The Court further finds that four (4) quarterly installments of premium of $25.25 each were duly paid by the assured on or before the fifth days of March, June, September and December in the year 1896, and that no other installments of premium on said policy were ever paid.

3. The Court further finds that Article II on the back of the policy, which by an express provision contained in the body of the policy is made a part of the contract of insurance, provides as follows:

"In case of non-payment of any annual premium or installment thereof within thirty days after the same shall fall due, this policy shall be null and void, subject however, to provisions as to cash surrender and paid up policy values. The company will, however, as a matter of favor and not of right, mail notice to the insured or the assignee at the last address furnished by him or them to the company, to the effect that the policy may be re-established by the payment of the annual premium or installment thereof still due, within ten days after mailing notice".

4. The application for insurance expressly declares and provides that the contract of insurance contained in the policy and in

the application shall be governed by the laws of the State of New York relating to life insurance.

36 5. The assured, William Meinert, died on March 24, 1900, and the proofs of death loss as required by the said policy of insurance were waived by the defendant.

6. At the time said William Meinert took out said policy of insurance, and from that time to the time of his death, he was a resident of Evansville, Indiana, and his post-office address was 217 Law Avenue, Evansville, Indiana.

7. On February 15, 1897, the defendant mailed at Chicago, Illinois, the following notice enclosed in an envelope and duly stamped and properly addressed to William Meinert, 217 Law Avenue, Evansville, Indiana:

"NEDERLAND LIFE INSURANCE CO. (LD)
Established in Amsterdam, (Holland), 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the Company or to a person authorized to collect such premium holding the Company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid up policy.

L. I. DUBOURCQ,
President U. S. Branch.

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

37 ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If this notice was not properly addressed, give changed address.
No.....Street.....Name Post Office.....
County of.....State of.....
Name .....
which said notice was duly received by William Meinert on February 16th, 1897, more than fifteen and less than forty five days prior to March 5th, 1897, and neither said Meinert nor any one on his behalf ever paid said installment of premium on March 5th, 1897, or at any time thereafter.

8. The Court further finds that on Saturday, April 3, 1897, the Nederland Life Insurance Company, Limited, duly sent by mail from Chicago, Illinois, to the assured, William Meinert a notice in the words and figures following.

"NEDERLAND LIFE INSURANCE CO., LIMITED.
Established 1858, Amsterdam, Holland.
United States Branch, 874 Broadway New York.

New York, April 3rd, 1897.

William Meinert,
217 Law Ave, Evansville, Ind.

Dear Sir:— The premium on your policy which fell due on the 5th March has not been paid and the policy is therefore null and void. I beg to inform you, however, that if the same is paid within ten days your policy will be reinstated.

38

L. I. DUBOURCQ,
President.

Policy No. 58021."
which said notice was received by William Meinert in due course of mail at or about eight o'clock, A. M. on Monday, April 5th, 1897, and said Meinert never acknowledged the receipt of said notice and never took any steps to have said policy reinstated.

9. The Court finds that on April 22, 1897, the Nederland Life Insurance Company, Limited, entered on the appropriate records of its office a declaration that said policy Number 58021 was forfeited and lapsed for failure to pay installment of premium.

10. The Court finds that said policy was at the time of bringing this action, and still is, in full force, and that the plaintiff is entitled to recover the amount of said policy unless, on the facts found herein, said policy was forfeited and lapsed under and pursuant to the above mentioned statute of the State of New York.

11. The Court finds that the amount now due and owing on

said policy amounts to the sum of four thousand nine hundred and eighty five dollars and five cents. ($4985.05)

JOHN H. BAKER,
Judge.

The Court states as conclusions of law on the facts found as aforesaid:

1. That the policy sued on is now and was at the beginning of this action, in full force and effect.

2. That said policy has not been forfeited, nor has it lapsed under and pursuant to the provisions of Chapter 690 of the Insurance Law of 1892 of the State of New York.

3. That the plaintiff, Mary Meinert, is entitled to recover of and from the defendant, the Nederland Life Insurance Company,
39 Limited, the sum of four thousand nine hundred eighty five dollars and five cents ($4985.05) with six per cent interest thereon from this date, and costs of suit, and is entitled to have judgment entered acordingly.

JOHN H. BAKER,
Judge.

And at the time the foregoing findings and conclusions of law are made, and before judgment is entered thereon, the defendant excepts and objects thereto for the following reasons:

First. That the said findings of fact are contrary to the evidence.

Second. That the said conclusions of law are contrary to law.

Third. Because the evidence does not show that the notice set forth in the seventh finding of fact was sent as therein stated, and does show that the notice sent and received as stated in said seventh finding was as follows:

NEDERLAND LIFE INSURANCE CO. (LD)
Established in Amsterdam (Holland) 1858.
United States Branch.
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the Company, or to a person authorized to collect such premiums (holding the

Company's receipt therefor) the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ,
President U. S. Branch.

40 Mr. William Meinert,
#217 Law Avenue,
Evansville, Ind.

If payment is made to the company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No.....Street.....Name Post Office.....
County of.....State of.....

Fourth. Because on the facts as found the policy sued on is not in force and was not in force at the beginning of said action, and the Court erred in its first conclusion of law.

Fifth. Because on the facts as found the plaintiff, Mary Meinert, is not entitled to recover upon said policy, and the Court erred in its third conclusion of law.

Sixth. Because on the facts as found the policy in suit has been forfeited under Chapter 690 of the Insurance Law of 1892 of the State of New York, and the Court erred in its second conclusion of law.

Seventh. Because upon the evidence and the law the policy in suit was forfeited under Chapter 690 of the Insurance
41 Law of 1892 of the State of New York, and the Court should have so found the facts and so concluded.

And the defendant, by its attorneys, now asks for time to prepare and file a bill of exceptions and is now allowed by the Court until October 1, 1902, to prepare, present and file such bill.

And before judgment is entered upon said findings and conclusions of law, the defendant now files its motion for a new trial in the words and figures following:

Comes now the defendant by Philip W. Frey and Morris and Newberger, its Attorneys, and moves the Court for a new trial in the above entitled cause for each of the following reasons.

First: For that each and all the findings of the Court are contrary to the evidence.

Second: For that the particular finding of the Court numbered 7, is contrary to the evidence in this respect and particular, that is to say, the evidence proves and shows by a fair preponderance and without material contradiction or uncertainty that the notice sent and received as stated in said seventh finding was different from the notice set forth in said finding and was in the words and figures following:

NEDERLAND LIFE INSURANCE CO. (LD)
Established in Amsterdam (Holland) 1858.
United States Branch.
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the Company, or to a person authorized to collect such premium
42 (holding the Company's receipt therefor) the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ,
President U. S. Branch.

Mr. William Meinert,
#217 Law Avenue,
Evansville, Ind.

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No.....Street.....Post Office.....

County of.....State of.....

Third. For that each and all the several findings of the Court are not sustained by the evidence.

Fourth. For that, in particular, the seventh finding is not sustained by the evidence in respect to the form and contents of the notice actually sent and received as stated in said finding, but the notice actually sent and received as shown by the evidence was different in tenor and effect from that so set forth.

43 Fifth. For that the decision and judgment of the Court are contrary to the law and evidence.

PHILIP W. FREY AND
MORRIS AND NEWBERGER,
Att'ys for defendant.

which motion is overruled by the Court, to which ruling by the Court the defendant, by its attorneys, at the time excepted and prayed time to file a bill of exceptions, and the Court now allows it, said defendant, until October 1, 1902, in which to prepare, present and file such bill of exceptions.

Thereupon it is considered by the Court that the plaintiff, Mary Meinert, recover of the defendant, Nederland Life Insurance Company, Limited, the sum of four thousand nine hundred eighty five dollars and five cents ($4985.05) with interest at the rate of six (6) per cent. per annum from this date and with her costs taxed at $.....dollars; to which the defendant at the time excepts and objects for the reason that the same is contrary to the evidence and the law; and the defendant is now granted until October 1, 1902, to prepare, present and file its bill of exceptions.

But the Court orders that no execution shall issue upon said judgment until October 1, 1902.

All of which is finally considered and adjudged by the Court.

And afterwards, towit; at the May Term of said Court, on the 29th day of September, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the defendant by counsel and files its bill of exceptions herein, in the words following towit.

Be it remembered that on the sixth day of May, 1902, the above entitled cause, which is an action at law to recover upon
44 a policy of life-insurance, came on for trial before the Honorable John H. Baker, District Judge presiding, without the intervention of a jury, which was duly waived by each of the parties, and the following proceedings were had:

45 IN THE CIRCUIT COURT OF THE UNITED STATES,

For the District of Indiana.

Mary Meinert,
v.
Nederland Life Insurance Company, Limited,
} No. 10,032, At Law.

Before BAKER, District Judge,

Without the intervention of a jury.

At Indianapolis, Indiana,
Tuesday May 6, 1902.

Appearances:

For the Plaintiff: G. K. Denton, Esq., and Larz A. Whitcomb, Esq;

For the Defendant: Philip W. Frey, Esq., and Morris & Newberger.

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PLAINTIFF'S EVIDENCE.

Witnesses:	Dir.	Cross:	Re-Dir.	Re-Cross.
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(Rebuttal)				
G. K. Denton,.....	114	114		

(Exhibits.)

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Exhibit "B"	Letter to G. K. Denton,.....	51
Exhibit "C"	Form of notice,.....	53
Exhibit "D"	Original & amended 3rd par. ans.....	55

DEFENDANT'S EVIDENCE.

Witnesses:	Dir.	Cross.	Re-Dir.	Re-Cross:
L. I. DuBourcq,.....	69	94	98	102
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(Exhibits)

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47 PLAINTIFF'S EVIDENCE.

MRS. MARY MEINERT, the plaintiff, called as a witness in her own behalf, being first duly sworn, testified as follows:

Direct Examination:

Questions by G. K. Denton, Esq:

Q State your name, Mrs. Meinert. A Mary Meinert.

Q You are the plaintiff in this case? A Yes.

Q And you are the Mary Meinert named in this policy of insurance that I now show you? A Yes sir.

Q What relation were you to the deceased, William Meinert, the insured in this policy? A He was my husband.

Q At the time the policy was issued and at the time of his death? A Yes sir.

Q What was his business? A Brick yard.

By the Court:

48 Q He was a brick maker? A Yes sir.

Q Worked at brick making? A Yes sir.

By Mr. Denton:

Q State whether or not he could read and write English? A No sir.

Mr. Newberger: I do not think that is material. We object to it.

Objection overruled.

Q You attended to his correspondence and kept his books and answered and wrote his letters? A I did.

Q You wrote them? A Yes sir.

Q How was the first year's premium paid? A It was paid by note, three months.

Q How were those notes signed? A Mary Meinert; I signed them.

Q You signed them also, did you? A Yes sir.

Q When did he die? A The 24th of March, 1900..

(The Defendant did not Cross-Examine the Witness.)

(Witness Excused.)

Mr. Whitcomb: Your Honor, on behalf of the plaintiff, we wish to introduce now in evidence the policy of insurance which was issued by the defendant company in this case on the life of William Meinert, on the 5th day of March, 1896,

The said policy of insurance so offered in evidence, was marked by the reporter Exhibit A, and read in evidence, and the same is in the words and figures following, to-wit:

50 EXHIBIT A.

In consideration of the application for this Policy of insurance, which is part of this contract, and each of the statements made therein, and in further consideration of the payment of the quarterly premiums of twenty five Dollars and twenty five Cents, to be made at its Branch Office in the City of New York on or before the fifth day of March, June, September and December, in each successive year during five years from the date hereof, and the further payment of sixty four Dollars and twenty five Cents, to be made at the said office on or before the said dates above mentioned during the sixth and each of the following fourteen years of this contract, or until the previous death of the insured, should his death occur before the expiration of the above specified period,

Does Promise to pay to Mary Meinert, wife of the insured, or if she shall not then be living to the insured's executors, administrators or assigns the sum of Five thousand Dollars, (any indebtedness to the Company on account of this contract to be first deducted therefrom) at the said branch office in the City of New York, within thirty days after satisfactory proofs of the death of William Meinert of Evansville in the County of Vanderburgh, State of Indiana, (herein called the insured) shall have been received and approved by the Company, at its said branch office; provided however that this Policy is issued and accepted under and

subject to the provisions and requirements printed or written upon the back of this Policy which shall be taken to be a part of this contract, as fully as if they were set forth at length on the face of this Policy and signed by the parties.

In the event of the death of the insured after one year from the day of its issue, this policy shall be incontestable, provided the written statements made by the applicant, and upon which this policy is issued, contain no intentional misstatement, and provided the provisions of this policy as to the payment of premiums, military and naval service, and adjustment for incorrect age, be complied with.

Notice is hereby given that the provisions of Section 88 of the Insurance law 1892 of the State of New York are waived by the Provisions and Requirements referring to this policy.

In Witness Whereof the Nederland Life Insurance Company, Limited, has caused this Policy to be issued and signed by the President and Secretary of the Branch Office in its name, at the Branch office in the City of New York, on the fifth day of March in the year One Thousand Eight Hundred and Ninety-six.

Examined:

L. I. DUBOURCQ,
President.

S. J. HOGERZEIL,
Secretary.

PROVISIONS AND REQUIREMENTS.

Payment of premiums.

Article I (a) All premiums are due and payable at the Branch Office of the Company; in the City of New York, on the dates fixed in the policy, for which receipts will be given signed by the President and Treasurer.

(b) Agents and other persons may be authorized to collect the premiums and to deliver receipts for same, (signed as stated above), but no receipt so given shall be valid unless countersigned by the persons so authorized. No payments made by any person, except in exchange for such receipt, will be recognized by the Company.

(c) The annual premium if desired, may be divided into half-yearly, or quarterly installments, in which case, however, interest will be added to

such premium at the rate of five per cent (5%) per annum.

(d) The premium for the current year, or any portion thereof, not paid at the death of the insured shall be deducted from the amount payable on the policy.

Grace. Article II. In case of non-payment of any annual premium or installment thereof, within thirty days after the same shall fall due, this policy shall be null and void, subject however to the provisions as to cash surrender and paid-up policy values. The Company will, however, as a matter of favor and not of right, mail notice to the insured or assignee, at the last address furnished by him or them to the Company, to the effect that the policy may be re-established by the payment of the annual premium or installments thereof still due, within ten days after mailing said notice.

Age. Article III. If it is found that the age of the insured was understated in his application, the amount of insurance payable shall be such proportion of the amount of the policy as the premium paid bears to the required premium at the true age.

Occupation or Employment. Article IV. (a) The risk of death within one year from the date of issue of this policy, while serving on any steamer or other vessel, or in consequence of duelling or violation of law, or engagement in any occupation or employment specially hazardous, viz: handling of electric wires and dynamos, blasting, mining, submarine labor, aeronautic ascensions, arctic explorations, the manufacture or handling of explosives, service upon any railway train, or in switching or coupling cars, is not assumed by the Company.

(b) In the event of the death of the insured during military or naval service in time of war, unless a written permit has been previously given by the President of the Branch Office of the Company in the City of New York, the Company will only be liable for the amount of the full reserve of the policy.

Suicide. Article V. In case of suicide of the insured, whether sane or insane, within a period of one year following the date of issue of this policy, the Company shall not be liable to pay the amount insured.

Cash Surrender Value. Paid-up Insurance.

Article VI. Surrender for cash or conversion of this policy into a paid up policy, is allowed on the application of the insured or the assignee, in accordance with the schedule printed or written in this policy, provided such application is made within six months after due date of the annual premium or installment thereof remaining unpaid.

Loans.

Article VII. (a) The insured may obtain a loan or advance, not exceeding the cash surrender value of this policy on the payment of interest at the rate of five per cent (5%) per annum, payable yearly in advance. Should the interest not be paid when due, the policy will become null and void, and the Company will only return the amount of its surrender value, after having deducted the amount due for sums loaned or advanced with interest thereon to date of payment.

(b) Application for loans must be forwarded to the Company's branch office in the City of New York on blanks provided by the Company, together with this policy, which, in case the loan is granted shall be assigned to the Company as collateral security, and deposited in the Branch Office of the Company in the City of New York.

Assignments.

Article VIII. Assignments must be made out in duplicate, on blanks provided by the Company, and forwarded to the Company's Branch Office in the City of New York. The Company will return one of the assignments and keep the duplicate on record. Assignments to be effective must be lodged with the Company at its Branch Office in the City of New York. In no case does the Company assume any responsibility for the validity of an assignment.

Alterations in the policy

Article IX. (a) Applications for alterations in the policy must be forwarded to the Company's Branch Office in the City of New York, together with the policy, on which such alteration shall be endorsed.

(b) All agreements made by the Company must be in writing signed by two of its executive officers, and no agent or other person is empowered to alter or waive any of the conditions of this policy or issue permits of any kind or make any agreement binding upon the Company.

Claims. Article X. The Company shall not be liable to make any payment on this policy unless proofs of the death of the insured, and of all other facts upon which the liability of the Company depends, be furnished to it at its branch office in the City of New York, in form satisfactory to the Company, within one year after the death of the insured.

COPY OF APPLICATION.

1. Amount to be insured $.....(Premiums payable annually)
2. On what Plan? .....
3. Name in full of the person whose life is to be insured?
   .....
4. A. Residence? City or Town.....
   County ..... State .....
   B. Give address where notices may be sent .....
   .....
5. A. Profession, occupation, or employment? (State particular branch of business or trade) .....
   B. If applicant is a married woman also state profession or employment of husband .....
6. Place and date of birth? .....
   A. Place..... County of..... State of.....
   B. Day..... Month..... Year.....
7. Whether married or single? .....
8. A. Have you any other insurance on your life?.....
   B. If so, when taken, with what Companies or Associations, and for what amounts? .....
   .....
9. Is you life now being proposed to any other Company or Association? ....
10. Has any application to insure your life ever been declined or postponed? If so, by what Companies or Associations?
    .....
11. A. To whom is the insurance applied for payable in event of death? ....
    B. If application is for an Endowment policy, to whom is the endowment payable at its maturity? .....
12. A. State relationship of beneficiary. If not a relation, give your reasons for insuring your life.....
    .....
    B. Present residence of beneficiary? .....

13. Give names and residences of two friends (for identification)
.....
.....

I do hereby declare that each and every of the statements made by me in the foregoing application are true and correct, whether written in my own hand or not, and I do hereby agree that this declaration, together with the said statements and those made by me on the Medical Examiner's Certificate shall be the basis of the policy of insurance to be drawn up under the provisions and requirements in force with the Company at the date of my signing this application, which provisions and requirements will be printed and written on the policy applied for, and which provisions and requirements are hereby accepted as binding upon me in like manner as if the same were set forth in full in this application; and that if any untrue averment is contained in this declaration, or in the said statement or certificate, or if it shall hereafter appear that any material information has been withheld, then the said policy shall be null and void, and all moneys which shall have been paid on account of the insurance shall be absolutely forfeited to the Company. I further agree that any policy which may be issued under this application shall not be in force until the actual payment and acceptance of the premium by said Company, or its duly authorized agent, during my life time and good health, and that the contract of insurance contained in the policy and in this application shall be governed by the laws of the State of New York, the place of said contract to be the principal office in the United States of said Company in the City of New York.

Dated at..... this..... day of..... 189

Witness:

(Signed)

.....

(Signed) Agent.

.....

(Signature of person applying for insurance on his or her life.)

COPY OF THE STATEMENTS MADE BY THE APPLICANT

IN THE MEDICAL EXAMINER'S CERTIFICATE.

1. A. Name in full? A.
   B. Age? Give year, month and day of birth. B. year? month? day?
   C. Nationality? C.
   D. Occupation or Employment? D.
   E. What have been your occupations in the past? E.
   F. Are you now, or have you ever been, either directly or indirectly, concerned in either the manufacture or sale of any kind of alcoholic beverage? F.
2. A. Where is your residence? How long have you lived at present residence? A.
   B. Do you intend to change your residence? If so, to what place, and for what reason? B.
   C. Where did you live before? When? How long? Why did you make a change? C.
   D. Have you at any time resided beyond the limits of the United States? Where? D.
3. A. What is the name and address of your medical attendant, or that of your family? (The family or personal physician is not allowed to make this examination.) A.
4. A. What physicians have you consulted here or elsewhere? When? For what complaints? A.
   B. Have you ever visited a watering place, or used medicinal waters for your health? B.
5. A. What is your present health? A.
   B. Have you any deformity? B.
   C. How is your appetite? Digestion? How do the bowels act? C.
   D. What illnesses have you had during childhood, and the last ten years? (Any disease of the throat, lungs or chest, palpitations of the heart, fainting fits, epilepsy, gout, hemorrhage, rheumatism, hæmorrhoids, varicocele, tumors, growth of any kind, hernia, gravel, cramps, stricture, syphilis, any disease of the kidneys, paralysis, wounds, external injuries, or any operations upon the body, discharge from the ear, dizziness? D.
6. A. Is it your habit to use spirits, wine, malt liquors, beer, or other alcoholic beverages? Is so, state exactly what quantities you use daily? A.

B. Are you now, or have you ever been in the habit of taking opium, morphine, chloral, sulphonal, coca, cocaine, bromide of potash, antipyrine, or any other narcotic drug? B.

C. Do you use tobacco? If so, what form, and how much daily? C.

7. Family History.

	Living.		Dead.		
	Age.	Health.	Specific cause of death.	Duration and character of fatal illness.	Remarks.
Father.					
Father's father.					
Father's mother.					
Mother.					
Mother's father.					
Mother's mother.					
Brothers.					
Sisters.					

A. Has there ever been any case of consumption, insanity, inebriety, or paralysis, in your family, or in your immediate or collateral ancestors? A.

B. How many children have you? What are their ages? If any have died, at what age did this occur, and what was the cause? B.

8. A. Have you ever been rejected for military service? If so, when, and for what reason? A.

B. Have you been a pensioner? If so, when, and for what? B.

C. Have you recently gained or lost in weight? If so, how much? C.

9. For Females.

A. Is menstruation perfectly regular? .....

B. Have you ever had floodings, or whites? .....

C. How often have you been confined? .....

D. Has artificial assistance ever been required in any confinement? .....

E. Have you had any miscarriage or abortion? If so, what were the results? .....

F. Are you pregnant now? If so, at what date do you expect confinement? .....

G. When were you confined last? .....

H. How many children have been born to you? .....

I. Did you nurse your children yourself? If not, why? .....

.....

K. Is there any indication of disease of the mammary glands?

STATEMENT OF THE APPLICANT.

I have answered the above questions to the best of my knowledge, truthfully and without any concealment, knowing that they form, together with the application, the basis of a Policy for Life Insurance which shall be null and void if any of the statements given by me above should be untrue.

Signed.....

The above is an exact reproduction of the wording of the original application and of Part I. of the medical examiner's certificate.

NEDERLAND LIFE INSURANCE COMPANY, (LD.)
Established Amsterdam, Holland, 1858.
United States Branch:
Principal Office,
874 Broadway, New York City.

Combined Term and 15 year Limited Payment Life Insurance.
No. of Policy 58021
Amount $5000
Insured William Meinert
Premium First Five Years, $25.25
Quarterly Premium Foll. 15 Years, $64.25
When Due March, June, Sept 2 Dec 5th
[SEAL]

At the expiration of the first period of five years, and before payment of the sixth annual premium or first instalment thereof, this policy will, at the written request of the legal holder, be exchanged for either of the undermentioned forms of policy, of the same face value as the original, and against payment of premiums as below specified, without medical re-examination.

Whole Life Policy, Annual Premium, $.....
Payment Life Policy, Annual Premium, $ .....
Payment Life Policy, Annual Premium, $ .....
10-Year Endowment Policy, Annual Premium, $ .....
15-Year Endowment Policy, Annual Premium, $ .....
20-Year Endowment Policy, Annual Premium, $ .....
5-Year Term, Annual Premium, $ .....

Examined:

.....
Actuary.

The Cash Surrender and Paid-up Policy values referred to in Article VI. of the Provisions and Requirements of this policy of insurance are stipulated in the following table.

In case this policy is reduced, the surrender values stated hereunder will be proportionately reduced.

Years from Date of Issue	Cash Surrender or Loan Value.	Paid-up Policy Value.
6	.....	.....
7	.....	.....
8	.....	.....
9	.....	.....
10	.....	.....
11	.....	.....
12	.....	.....
13	.....	.....
14	.....	.....
15	.....	.....
16	.....	.....
17	.....	.....
18	.....	.....
19	.....	.....
20	.....	.....
21	.....	.....
22	.....	.....
23	.....	.....
24	.....	.....
25	.....	.....

At the written request of the Insured, the beneficiary clause appearing on the face of this policy reading: "Does promise to pay to Mary Meinert, wife of the Insured, or if she shall not then be living, to the insured's executors, administrators or assigns" is hereby amended to read hereafter as follows: "Does promise to pay to Mary Meinert, wife of the insured, or if she shall not then be living to Carolina Louisa Meinert, daughter of the insured, or if neither survive, to the insured's executors, administrators or assigns"

Dated at New York this 18th day of March 1896

NEDERLAND LIFE INSURANCE COMPANY (LIMITED)

L. I. DUBOURCQ

President U. S. B.

By R L WOLTERBECK

Acting Secretary

51 Mr. Denton: Now, if the Court please, we want to introduce in evidence the letter from the company, dated May 18, 1901, to G. K. Denton.

The said letter so offered in evidence, was read in evidence, marked by the Reporter Exhibit B., and the same is in the words and figures following, to-wit:

EXHIBIT B. 2.

NEDERLAND

LIFE INSURANCE COMPANY (LD).
Established 1858, Amsterdam, Holland.
United States Branch, Main Office New York.
11 Broadway,

L. I. Dubourcq, President.
A. W. C. Pilgrim, Jr., Secretary and Treasurer.
S. H. Wolfe, Consulting Actuary.

New York, May 18th, 1901.

G. K. Denton, Esq.,
Attorney At Law,
#113 Upper Fourth St.,
Evansville, Ind.

Dear Sir:—

Your letter of May 15th, 1901, regarding certain policy of insurance taken out under #58021 by Mr. William Meinert, and addressed to Mr. Edward A. Ferguson, Chicago, Ill, has been referred by him to us for attention and reply.

52 The above mentioned policy, was, as correctly stated by our agent, cancelled for non payment of the premium due on March 5th, 1897. From this it results that the Company was after said date not any more liable under the policy.

In order to enable you to fully reach an opinion as to the condition of the matter, which Mrs. Meinert submitted to you, and according to your request, we beg herewith to enclose copies of the premium notice which we sent in February, 1897, to Mr. William Meinert, and of the ten days notice which was sent on April 3rd, 1897, by Mr. Edward A. Ferguson in our name to Mr. Meinert.

From this you will see that the Company fulfilled all the requirements as to the proper notification to the insured, of the payment of the premium due on March 5th, 1897.

We trust that you will reach the conclusion that you agree as to the position the Company takes in the matter, as to its non-liability under the policy.

As soon as you have formed your opinion, please return to us the enclosed copies of notices; at the same time it would be very desirable if you could induce Mrs. Meinert to put the policy #58021 in your hands, for the purpose of returning the policy to us, as said policy would be not of any use for her any more, and its

return to the Company would prevent the question of the liability of the Company being any more questioned in the future.

53 Very truly yours, ,

UNITED STATES BRANCH OF THE
NEDERLAND LIFE INSURANCE CO., (LIM.)
L. I. DUBOURCQ,
President.

* * *

Mr. Denton: Now we introduce in evidence one of the enclosures in that letter, notice of premium unpaid, dated April 3, 1897.

Said notice so offered in evidence, was read in evidence, marked by the Reporter Exhibit C., and the same is in the words and figures following, to-wit:

EXHIBIT C.

364-12, '96, 5M.

NEDERLAND
LIFE INSURANCE CO., (LIMITED),
Established 1858, Amsterdam, Holland,
United States Branch,
874 Broadway, New York.

(Copy)
New York, April 3, 1897.

Wm Meinert
217 Law Ave
Evansville Ind

54 Dear Sir:

The premium on your policy, which fell due on the 5th March has not been paid and the policy is therefore null and void. I beg to inform you however that if the same is paid within ten days your policy will be reinstated.

L. I. DUBOURCQ,
President.

Policy No. 58021.

* * * *

Mr. Denton: Now, if the Court please, I want to introduce the original third paragraph of answer that was withdrawn and the amended third paragraph that was filed. I will only read a part of it here that I want to call attention to.

(Reading) "That on the 3rd day of April, 1897, that being more than thirty days after the mailing of the notice aforesaid, the defendant declared said policy forfeited and lapsed."

The said original third paragraph of answer and the amended third paragraph of answer are marked by the Reporter Exhibit D., and they are, respectively, in the words and figures following, to-wit:

EXHIBIT D.

Original Third Paragraph of Answer.

The defendant, The Nederland Life Insurance Company, Limited, for a further and third paragraph of answer to the complaint of the plaintiff herein avers:

That it admits the execution of the policy of life insurance set out in the complaint of the plaintiff, but it avers: That in consideration of the issuance and delivery thereof, on the 5th day of March, 1896, the plaintiff agreed to pay to said defendant on the 5th day each of March, June, September and December of each of the five years succeeding the said year of 1896 the sum of Twenty-five Dollars and Twenty-five Cents ($25.25); that among other provisions in said policy and as a part thereof, there is the following:

> "In case of non-payment of any annual premium, or installment thereof, within thirty (30) days after the same shall fall due, this policy shall be null and void, subject, however, to the provisions as to cash surrender and paid up policy values."

That by the terms of said policy a premium on said policy became and was due on the 25th day of March 1897, but plaintiff failed to pay same at maturity and the same still remains unpaid; that said policy had not been assigned by said William Meinert, the person insured, to any other person; that on the 1st day of February, 1897, the said 1st day of February, 1897, being more than fifteen (15) days and not more than forty-five (45) days prior to the date when said last mentioned installment of premium was, by the terms of said policy, payable, the said defendant Company sent to William Meinert, the insured in said policy, an envelope upon which the postage necessary to its transmission in the United States mails to its addressed destination had been prepaid by the defendant Company; that the said envelope was addressed and mailed to the last known post office address of the said William Meinert and that said envelope so addressed and mailed, with postage thereon so prepaid, contained a written and printed notice, of which the following is a copy:

"337.

NEDERLAND LIFE INSURANCE CO., (LD.)
Established in Amesterdam (Holland), 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your policy provide that unless such premium shall be paid
57 at the United States Branch Office of the Company, or to a person authorized to collect such premium, holding the Company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or Paid-up Policy.

L. I. DUBOURCQ.
President U. S. Branch.

Mr. William Meinert
217 Law Avenue,
Evansville, Ind.

If payment is made to the Company direct it can be done by valid draft check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed give changed address.
No..... Street.....
58 Name Post-Office..... County of.....
State of .....
Name .....

That the plaintiff failed to pay said premium of Twenty-five Dollars and Twenty-five Cents ($25.25) on the 5th day of March, 1897, and failed to pay the same within the time in said notice stated and that the same still remains unpaid; that on the 3rd day of April, 1897, that being more than thirty (30) days after the mailing of

the notice aforesaid, the defendant Company declared said policy forfeited and lapsed.

That the provisions of the insurance law of the State of New York with reference to the surrender value of lapsed or forfeited policies, being Section 88 of the Insurance Law of the State of New York, were waived by the said plaintiff, William Meinert, and that the policy of insurance sued on herein, a copy of which is filed with the complaint and marked "Exhibit A" and which exhibit is referred to as a part of this answer, was accepted by the said William Meinert with the following provision, to-wit:

"Notice is hereby given that the provisions of Section 88 of the Insurance Law 1892 of the State of New York are waived by the provisions and requirements referring to this policy."
59 printed in red ink on the margin of the face of the policy when issued.

Wherefore, the said policy became lapsed and forfeited, null, void and of no effect and all premiums previously paid on said policy became forfeited to the Company.

Wherefore, the defendant demands judgment.

(Signed) PHILIP W. FREY,
Attorney for Defendant.

AMENDED THIRD PARAGRAPH OF ANSWER.

United States of America, }
State of Indiana. }

IN THE CIRCUIT COURT OF THE UNITED STATES

For the District of Indiana.

Mary Meinert
vs.
The Nederland Life Insurance Company, Limited.
} Amended Third Paragraph of Defendant's Answer.

Paragraph 3. The defendant, The Nederland Life Insur-
60 ance Company, Limited, for a further and amended third paragraph of answer to the complaint of the plaintiff herein, avers:

That it admits the execution of the policy of life insurance set out in the complaint of the plaintiff, but it avers: That in consideration of the issuance and delivery thereof, on the 5th day of March, 1896, the plaintiff agreed to pay to said defendant on the 5th day of each of March, June, September and December of each

of the five years succeeding the said year of 1896 the sum of Twenty-five Dollars and Twenty-five cents ($25.25); that among other provisions in said policy and as a part thereof there is the following:

"In case of non-payment of any annual premium, or installment thereof, within thirty (30) days after the same shall fall due, this policy shall be null and void, subject, however, to the provisions as to cash surrender and paid up policy values."

That by the terms of said policy a premium on said policy became and was due on the 5th day of March, 1897, but plaintiff failed to pay same at maturity and the same still remains unpaid; that said policy had not been assigned by said William Meinert, the person insured, to any other person; that on the 15th day of February, 1897, the said 15th day of February, 1897, being more than fifteen (15) days and not more than forty-five (45) days
61 prior to the date when said last mentioned installment of premium was, by the terms of said policy, payable, the said defendant Company sent to William Meinert, the insured in said policy, an envelope upon which the postage necessary to its transmission in the United States mails to its addressed destination had been prepaid by the defendant Company; that the said envelope was addressed and mailed to the last known post office address of the said William Meinert and that said envelope so addressed and mailed, with postage thereon so prepaid, contained a written and printed notice, of which the following is a copy:

"337.

NEDERLAND LIFE INSURANCE CO., (LD.)
Established in Amsterdam (Holland), 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the Company, or to a person
62 authorized to collect such premium, holding the Company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or Paid-up Policy.

L. I. DUBOURCQ.
President U. S. Branch.

Mr. William Meinert,
217 Law Avenue,
Evansville, Ind.

If payment is made to the Company direct it can be done by valid draft check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

63 No.... Street.....Name Post Office.....
County of ..... State of .....
Name .....

That the plaintiff failed to pay said premium of Twenty-five Dollars and Twenty-five Cents ($25.25) on the 5th day of March, 1897, and failed to pay the same within the time in said notice stated and that the same still remains unpaid; that on the 22nd day of April, 1897, that being more than thirty (30) days after the mailing of the notice aforesaid, the defendant Company declared said policy forfeited and lapsed.

That the provisions of the insurance law of the State of New York with reference to the surrender value of lapsed or forfeited policies, being Section 88 of the Insurance Law of the State of New York, were waived by the said plaintiff, William Meinert, and that the policy of insurance sued on herein, a copy of which is filed with the complaint and marked "Exhibit A" and which exhibit is referred to as a part of this answer, was accepted by the said William Meinert with the following provision, to-wit:

"Notice is hereby given that the provisions of Section 88 of the Insurance Law of 1892 of the State of New York are waived by the provisions and requirements referred to this policy."

64 printed in red ink on the margin of the fact of the policy when issued.

Wherefore, the said policy became lapsed and forfeited, null,

void and of no effect and all premiums previously paid on said policy became forfeited to the Company.

Wherefore, the defendant demands judgment.

(Signed) PHILIP W. FREY,
Attorney for Defendant.

* * * * *

Whereupon the plaintiff rested its case.

65 And the defendant to sustain the issues in its behalf, introduced the following evidence,

That

is

to

say:

Mr. Newberger: The Defendant offers in evidence the affidavit of James T. Fulker.

Said affidavit of James T. Fulker so offered was read in evidence, marked by the Reporter Exhibit E., and the same is in the words and figures following, to-wit:

EXHIBIT E.

AFFIDAVIT OF MR. JAMES T. FULKER.

IN THE CIRCUIT COURT OF THE UNITED STATES

For the District of Indiana.

No. 10,032.

66 Mary Meinert
vs.
Nederland Life Insurance Company, Limited.

County of Marion, } ss:
State of Indiana, }

Before the undersigned, a Notary Public in and for the County of Marion, in the State of Indiana, personally appeared James T. Fulker, who, being duly sworn, upon his oath, says:

That he is now, and for a period extending back prior to the 1st day of February, 1897, has been, employed in the office of Edward A. Ferguson, a General Agent of the Nederland Life Insurance Co., Limited, and having in charge as a part of the territory of such

agency the State of Indiana, which said State has been a part of such agency ever since 1894.

That on the 15th day of February, 1897, a written and printed notice was by him placed in an envelope, postage prepaid, duly addressed to "William Meinert, 217 Law Avenue, Evansville, Indiana, in the mail box established by the government of the United States in connection with the post office in the City of Chi-
67 cago, located in the Reliance Building in said City, which notice was and is as follows:

NEDERLAND LIFE INSURANCE Co'y. (Ld)
Established in Amsterdam (Holland) 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the Company, or to a person authorized to collect such premium (holding the Company's receipt therefor) the policy and all payments thereon will be forfeited and void, except as to the right to a Cash Surrender Value or Paid-up Policy.

L. I. DUBOURCQ.
President U. S. Branch.

Mr. William Meinert,
#217 Law Avenue,
Evansville, Ind.

68 If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the note was not properly addressed, give changed address.

No..... Street.....Name Post-Office.....
County of ..... State of .....
Name .....

That the address of said William Meinert as placed upon said envelope was his true address, as shown by the books of said company, and that said address was the last known post office address of said William Minert.

Affiant further says that he was duly authorized by said cor-
69 poration to mail said notice, and that the same was duly addressed and mailed by said Neiderland Life Insurance Co., Limited, through him as its agent.

(Signed) JAMES T. FULKER

Subscribed and sworn to before me this the 6th day of May, 1902.

CHARLES ALCON,
Notary Public.

My commission expires Jan. 4, 1906.
[SEAL]

* * * * *

L. I. DUBOURCQ, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Newberger:

Q You may state your name to the Court. A L. I. Dubourcq.

Q Where do you reside? A. New York City.

Q What is your business? A I am president of the United States Branch of the Nederland Life Insurance Company.

70 Q What is the country of your nativity? A Holland.

Q How long have you been in the United States connected with that company? A I came here in April 1893.

Q What position did you hold with that company in the years 1896 and 1897? A I had the same position that I hold now, President of the United States Branch of the Nederland Life Insurance Company. Manager of the Branch Office.

Q Where was that Branch located in the years 1896 and on? A The offices of the Branch were moved the first of April, 1897, to eleven Broadway. Before that time they were located at eight hundred and seventy-four Broadway.

Q Was all your mail delivered after the removal to the place to which you removed? A Yes sir.

Q Was that place well know to the New York Postoffice? A Yes sir.

Q Did you send and receive considerable mail there? A Yes sir.

Q Did your company, through your Branch, ever take any action to cancel and forfeit the policy of William Meinert? If so, you may state when. A We did so in the latter days of April; April 1897.

71 Q When did you declare the policy forfeited and so enter it upon your books?

Mr. Denton: We object to that. The books will show that fact as the best evidence.

The Court: The objection is overruled. He may testify to the fact if he knows it.

Q State the date. A. The date was made on April 30, 1897.

Q. The policy, Mr. Dubourcq, was issued, according to its date was issued on March 5, 1896? A Yes sir.

Q Will you tell the Court what premiums were annually paid on that policy? A On the policy were paid four quarterly installments of the premiums. The first due on March 5th, 1896, then on June 5th, 1896, on September 5th, 1896, and December 5th, 1896.

Q Were any other premiums ever paid? A No, we did not receive any other premiums.

Q Now, what notice, if any, was given with respect to the payment of the premium, which, by the terms of the policy, is stated to be due on March 5th, 1896? A A notice similar as to the blue one you have in your hands.

Q Had any other notice been used by your company than
72 the one sent out at that time? A Yes, we had one we used before September 1896, another form of notice.

Q I wish you would explain to the Court just what notices your company did use from time to time and what was done in New York towards giving Meinert and other policy-holders notice as to what premiums were due on and before March 5th, 1897?

Mr. Denton: That is objected to. I do not see that what was done prior to March 5th, 1897, by the company can be material. The question is what notice they gave in this case, not what was their habit or what they had been doing prior to that time.

The Court: You have introduced evidence tending to show that they sent a particular form of notice which you claim is insufficient, under the statute of New York. Their defense is that another notice was sent. They have a right to show that they had various sorts of notices and to explain if they can

that the copy sent you and to Mr. Frey was through error and not the notice that was actually mailed to Mr. Meinert. That is the purpose of this evidence and it is competent. Your objection is overruled and you may have an exception.

73 A Well, as I said before, before September, 1896, we used the form of notice which I have here in my hands, in which notice it is said, among other things, that the conditions of your policy provide—

Mr. Denton: I object to the witness stating the contents of the notice.

Mr. Newberger: Let that be marked for identification, Exhibit F.

Mr. Newberger: I offer this form of notice in evidence in connection with the testimony of Mr. Dubourcq, and for the purpose of assisting him in the explanation which he is about to make. I introduce the face and back of the form both.

Said notice so offered, was then read in evidence, marked by the Reporter Exhibit F., and the same is in the words and figures following, to-wit:

EXHIBIT F.

337 NEDERLAND LIFE INSURANCE CO. (LD.)
Established in Amsterdam (Holland,) 1858.
874 Broadway, New York City.

74 Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the..... premium of $..... on Policy No.... will fall due on the ..... day of ..... 189 , if the policy be then in force. The conditions of your Policy provide that unless such premium shall be paid at the United States Branch Office of the Company,, or to a person authorized to collect such premium, holding the Company's receipt therefor, by or before that date, the Policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender Value or Paid-up Policy.

L. I. BUBOURCQ.
President U. S. Branch.

Mr.....
.....
.....

If payment is made to the Company direct it can be done by valid draft check, postal or express money order made out to the

order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

75 ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No..... Street .....Name Post-Office.....
County of ..... State of .....
Name .....

* * * *

Q Did you at any time begin to use another form? A We did on or about September, 1896.

Q. Do you know what color of paper the old notice, about which you testified, was printed on? A Always on blue paper.

Q The same as the one introduced in evidence? A Exactly the same.

Q Was there any other size or form used than the one just offered in evidence? A No; the same size and color was used.

76 Q What if any notice was used after 1896 in September? A This notice that I have here in my hands.

The notice referred to by the witness was then marked for identification by the Reporter Exhibit G.

Mr. Newberger: We offer to read in evidence the printed part of this notice and not the written part.

Mr. Denton: This is addressed to another party and we object to its being read. If they have a blank form of the notice that they used that is a different thing, but I don't think they have the right to put in evidence a notice that is addressed to another party.

Mr. Newberger: I limited my offer to the blank part of it.

The Court: The offer related to the blank form only.

Q Were you able to find any of this form entirely blank? A No I was not.

Q State how you happened to have this one here with you and what that really is? A The notice I have here in my hands

77 was addressed to Mr. Sam Cundiff, in Forney, Texas. The notice which we sent out at that time to all of our insured whose premiums were due was in that form. In looking up our

old archives I couldn't find any of these notices because they were all destroyed or used, and therefore I took this one that was filled in.

Q Where did you find that? A I found that in the desk of the secretary.

Q Was that one that had been sent out and come back? A This one had been sent out and sent back because the man changed his address.

Q And you found it as returned? A Yes, as returned.

The Court: So much of that as is in printing, excluding the written matter, may be admitted in evidence, and the plaintiff may have an exception.

The form of notice so offered in evidence, was read in evidence, marked by the Reporter Exhibit G., and the same is in the words and figures following, to-wit:

78 337-9-96 5M. EXHIBIT G.

NEDERLAND LIFE INSURANCE CO., (LD.)
Established in Amsterdam (Holland,) 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the ....premium of $..... on Policy No..... will fall due on the ..... day of ..... 189 , if the policy be then in force. Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the Company,, or to a person authorized to collect such premium (holding the Company's receipt therefor) the policy and all payments thereon will be forfeited and void, except as to the right to a Cash Surrender Value or Paid-up Policy.

L. I. DUBOURCQ.
President U. S. Branch.

Mr.....
.....
.....

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to
79 the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over.)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No..... Street.....Name Post-Office.....

County of ..... State of .....

Name .....

* * * * *

Q. Can you tell the court how you happened to have this form of notice printed and put in service?

Mr. Denton: Objected to as incompetent, as to why they changed. the form of notice and so on.

The Court: No, he testified that they did change the form of notice. The president of the corporation swears to that
80 fact. Of course, the cross examination would draw that out, why they did that, and everything of that sort, but on the direct it is not important.

Q You may state whether this form of notice was put in use as a notice to policy-holders of the time for payment of premium and for the purposes set forth in the notice itself, from September, 1896 until, say the first of May, 1897? A This notice was used during that period from September, 1896, to on or about the first of May, 1897, and then we changed the form again to the form I have here, which is in use up to this date.

Q Then in 1897 you had a new issue in the form I now show you? A Yes sir.

Q When was the issue, that I now have in my hand, printed, if you know? A The one that you have in your hand was for the first time printed in April, 1897.

Mr. Newberger: Let the Reporter identify that.

Said form of notice was identified by the Reporter as Exhibit H.,

Mr. Newberger: We now offer the blank form in evidence, marked Exhibit H.

81 The form of notice so offered in evidence, marked by the Reporter Exhibit H., was then read in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT H.

337-8-1900. 10 M.

NEDERLAND LIFE INSURANCE CO., (LD.)
Established in Amsterdam (Holland). 1858.
United States Branch:
11 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the .....
.....premium of $..... on Policy No..... will fall due on the ..... day of ..... 190 , if the policy be then in force. Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch office of the Company, the policy and all payments thereon will be forfeited and void, except as to the right to a Cash Surrender Value or Paid-up Policy.

L. I. DUBOURCQ.
President U. S. Branch.

82 Mr.....
.....
.....

Payment is to be made to the Company direct by valid draft, check, postal or express money order payable at New York, made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(On the reverse side of said notice there appears the following:)

ATTENTION.

No payment of premium made except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company can be recognized.

Please return this notice when you send remittance to the Branch Office.

If the notice was not properly addressed, give changed address.
No..... Street.....Name Post-Office.....
County of ..... State of .....
Name .....

* * * * *

83 Q. Now I wish you would state to the court whether there was any difference in the color, form or style of type of the notice printed from this that have been identified and offered in

evidence here? A No sir, the color, size and type are all the same.

Q Then they were all on blue paper? A All on blue paper and of the same size.

Q And all type closely resemble the ones here? A Yes sir.

Q Now I will ask you, Mr. Dubourcq, when, if you know, a notice was sent to William Meinert and through what agency, if any was sent? What you had to do with the notice in New York and what notice it was that was given? A I know that about February 11th, it may be it was February tenth—

Q 1897? A 1897; we mailed to Chicago a bunch of notices on this blue paper, to be sent out to policy holders, like Exhibit G. It was a rule in our office that we send a bunch of these notices to Chicago to be distributed, because it relieved the office so much of the work of mailing. This notice and several like that were sent to Chicago about the 15th of February, 1897, with Mr. Meinert's address.

84 Q To whom were they sent in Chicago? A To Mr. Edward A. Ferguson.

Q Who was Mr. Edward A. Ferguson? A Our general agent for the Western States and among them the State of Indiana.

Q You sent a bunch of notices? A To be distributed.

Q What date was it you mailed them from New York? A On or about February 10th; may be February 9th, 1897.

Q Were they filled out? A They were filled out in the office in New York.

Q Was the address on them? A The addresses were written in the office, fully filled out.

Q But the card notices were put in one bunch and sent to Chicago to be mailed to the persons insured. A Fully filled out, yes sir, filled out in full.

Mr. Newberger: I will ask the Reporter to identify this letter.

Said letter is identified by the Reporter Exhibit I.

Q. I will ask you if you ever received a letter from G. K. Denton, addressed to Mr. Edward A. Ferguson, dated May 15th, 1901? I show you the original marked Exhibit I. A I received that letter on or about May 16th.

85 Q 1901? A 1901, yes sir.

Q. From whom did the letter come intermediately? A Immediately I received it from Mr. Ferguson, the agent at Chicago.

Q He was then the agent of the Company? A He was then the agent of the Company.

Mr. Newberger: I will read this letter in evidence.

Said letter so offered in evidence and marked by the Reporter Exhibit I, was then read in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT I.

(Letter from G. K. Denton to E. A. Ferguson, under date of May 15th, 1901.)

G. K. DENTON,
Attorney at Law,
Dickman Building,
113 Upper Fourth Street.

Evansville, Ind., May 15th, 1901

Mr. Edward A. Ferguson,
Chicago, Ill.

86 Dear Sir:

Mrs. Meinert has placed a policy in my hands on the life of her late husband William Meinert in the Nederland Life Insurance Company, Limited, of Amsterdam, Holland, for the purpose of having me investigate the standing of her husband in the Company at the time of his death. The number of the policy is 58021.

If you desire us to make proof of death, if you will forward me the blanks, I will see that this is done. Your agent here claims that the policy lapsed by nonpayment of the first installment of the annual premium in March, 1897.

Did you give a thirty days' notice of this installment, or do you rely upon the waiver of the requirements of the New York law printed on the margin of the policy? I notice that one of the conditions of the policy also provides that the Company will give a ten days' notice.

If you are willing to do so, I would like to have you send me copies of any and all notices you may have given him in connection with his policy of insurance. I do not know what his standing in the order was, and cannot give my client any opinion until I know all the facts thoroughly. If I can recover the money for her, I should like to do so, (*2) but if there is no liability
87 on account of failure on his part to comply with any of the provisions of the policy which would render it void I do not care to put you to unnecessary trouble and expense in the matter.

Very truly yours,
(Signed) G. K. DENTON.

{ Received
Answered
...5/18/1901.. }

* * * * *

Q. Now what did you do when you got this letter? Did you make any response? A I replied to Mr. Denton directly.

Q Was the letter read in evidence on behalf of the plaintiff and marked Exhibit B, your answer? A That is my answer, yes; Exhibit B.

Q Did you enclose a notice, of which Exhibit C is a copy, in that letter? A I did.

88 Q Did you enclose any other notice? A I enclosed another notice on the blue paper.

Mr. Newberger: I will ask the Reporter to identify this exhibit.

Said notice is marked for identification by the Reporter Exhibit J.

Q Are you able to state whether Exhibit J, which I now hand you, is the one which you enclosed in the letter? A Yes sir, the notice I enclosed in my letter is the notice like number "J."

Q I will ask you to state to the court how you happened to enclose that form of notice in the ,etter? A Because, at that time, I could not find any other form in our office than this one and I thought it was the real notice we sent to Mr Meinert.

Q You thought it was? A I thought it was and I sent it in answer to Mr. Denton's letter.

Q Was that one of a number of blanks that you found? Where did you find it? A I found it in a drawer of the desk of the secretary, where we have a number of these blanks to use for occasional notice.

Q Was your attention at that time called, or was your mind
89 recalled to the fact of the different issues of notices that had been made by your company and to the changes that had occurred? A I was of the impression at that time that we had only two issues of the notice and the third one escaped my notice at that time.

Q What do say now as to that being the correct form of the notice sent to Meinert? A I say it was not the correct form of notice sent to him.

Q Now, Mr. Dubourcq, an answer was filed in this case which has been read in evidence and which declares upon that form of notice. I will ask you what, if any, notice, or copy of it, you sent to your attorneys, or to Mr. Frey, your attorney,—or any other attorney, perhaps, at that time,—as the notice which was sent out? Did you send him any form of notice? A I sent Mr. Frey a copy in the same shape as this one that was sent to Mr. Denton.

Q Where did you get that copy? A I got it in the same place that I got this one. Out of the secretary's desk.

Q When you say this notice, you mean similar to Exhibit "J."? A Yes sir.

Q The same form that you sent to Mr. Denton you sent
90 to Mr. Frey? A Yes sir.

Q Had your attention at that time been called to the different issues? A No, not yet. I hadn't yet found out.

Q How did it happen that your attention was ever called to it, so that you discovered that a mistake had been made in the form of notice which you say you had sent out to Mr. Meinert? A I had a long correspondence with Mr. Frey about the notice and I decided to make an investigation, because I wanted to know, and in looking it up, we found a whole bunch of notices, and I found that a mistake had been made; and then I recollected, remembered that we had that edition between the edition of before September, 1896 and after 1896.

Q Do you remember after making that discovery that you telegraphed Mr. Frey or communicated to him that fact? A I communicated to him by letter. I don't think I telegraphed him.

Q When you found out the mistake in the form you informed him of that fact? A I communicated immediately with Mr. Frey.

Q Mr. Dubourcq, I will ask you if you have refreshed your recollection by the telegram which I have shown you, as to the
91 manner in which you communicated the discovery to Mr. Frey?

A That was the telegram that I sent to Mr. Frey immediately on the discovery and then I wrote him a letter immediately on the same day.

Q Now by whom was this notice of April 3rd, 1897, sent out? I refer to Exhibit C. A That was sent out by the Chicago office.

Q You know nothing personally about the sending out of that notice? A Do you mean that notice, or the original notice.

Q No, this April 3rd, 1897, ten days' notice, which was sent out, was it, on April 3rd, 1897? A I don't know personally, but that was the rule. But I don't know personally.

Mr. Newberger: We now read in evidence the notice marked Exhibit J.

Said notice so offered in evidence, marked by the Reporter Exhibit J/, was then read in evidence and the same is in the words and figures following, to-wit:

92 EXHIBIT J.

337. Copy.

NEDERLAND LIFE INSURANCE CO., (LD.)
Established in Amsterdam (Holland,) 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the Quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your Policy provide that unless such premium shall be paid at the United States Branch Office of the Company,, or to a person authorized to collect such premium, holding the Company's receipt therefor, by or before that date, the Policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender Value or Paid-up Policy.

L. I. DUBOURCQ.
President U. S. Branch.

Mr. William Meinert
217 Law Ave.
Evansville Ind.

If payment is made to the Company direct it can be done by
93 valid draft check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.) (Over.)

(Stamped across the face of the above notice by rubber stamp were the following words, to-wit:)

Pay to
Edward A. Ferguson,
Reliance Building, Chicago, Ill.

(And on the reverse side of said notice appears the following:)

ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not proper addressed, give changed address.

No..... Street.....Name Post-Office.....
County of ..... State of .....
Name .....

94 *Cross-Examination.*

Questions by Mr. Denton:

XQ Have you your books with you, Mr. Dubourcq, showing the cancellation of this policy? A I have here with me a card which is our books,—card system.

XQ Have you your books with you? A No, I have this.

XQ Have you your books? A No, I have no books. I have this. It is exactly the same thing. We have a card system.

XQ When you declare a policy forfeited and lapsed, what steps do you take? A Steps?

XQ Yes. A I make an entry in my books, as you see there in green ink of that kind, and also on the register.

XQ How often do you go over your books and do that? Once every month? A Twice a month.

XQ In the middle of the month and latter part of the month? A Fifteenth of the month and on the last day.

95 XQ Now this notice, this ten day notice you say was sent out from Chicago by Mr. Ferguson? A Yes sir.

XQ He sends these out. Is he furnished with them by you? A He is furnished the blanks by me.

XQ And he fills them out and mails them? A He fills them out.

XQ Did you have any agents in 1897? In March or April, 1897, at Evansville, Indiana? A Mr. Lowenthal.

XQ Mr. Harry Lowenthal? A Yes sir.

XQ He was the regular agent at that place? A He was a special agent of Mr. Ferguson's.

XQ Mr. Ferguson was the manager of the western division? A Yes sir.

XQ And Mr. Lowenthal was the agent for the territory of Evansville? A Local agent at Evansville.

XQ You made out a regular form of application for authority for him to transact the business of life insurance and accept risks, did you not, under the Indiana Statute? A For Mr. Lowenthal?

XQ Yes. A Yes, we had complied with the statute.

96 XQ You complied with the Indiana statute in regard to getting authority on his part to represent you? A Certainly.

XQ Now you say in your policy here and also in your notice that the premium is not to be paid to any one except to an agent

holding the receipt of the company signed by two officers. Did you furnish Mr. Lowenthal with forms of these receipts? A I furnished Mr. Ferguson and Mr. Ferguson furnished Mr. Lowenthal.

XQ That was in 1897? A That was in 1897, February, 1897.

XQ Now you don't know when this thirty day notice was mailed by Mr. Ferguson, do you? A I don't know that, no.

XQ When did you first discover you had made a mistake in the form of the notice? A I cannot recollect exactly the date.

XQ Well it was after you had gotten word that the court had held your other notice insufficient, wasn't it? A I can't recollect the date; I don't know.

XQ I am not asking you about the date now. Your attorney advised you that the notice you had furnished him was not in conformity to the New York law, it was insufficient, wasn't it? A Yes sir.

97 XQ And that the court had so held? A Yes sir.

XQ Then you sent him this other notice? A Yes, I investigated and found the notice that we sent.

XQ You investigated after you found the court had held the notice insufficient? A Yes sir.

XQ It was then you discovered your mistake? A Yes sir.

XQ Now you say no premiums for 1897 were ever received by you, that is no premiums were sent directly to you? A No sir.

XQ You don't know whether any premiums were received by Mr. Lowenthal, at Evansville or not? A I know that because Mr. Ferguson—

XQ (Interrupting:) You only know what they told you. You don't know anything except what they told you, do you? A No, of course not.

XQ You don't know of your own personal knowledge whether these premiums were paid? A I don't know.

XQ You say you sent out a receipt for these Evansville parties to Ferguson? A Yes sir.

98 XQ And he sent them to Lowenthal? A Yes sir.

XQ And whether they were paid or not, you don't know; you can't say? A Except by letter.

Re-Examination:

Questions by Mr. Newberger:

RQ Mr. Dubourcq, you testified, I believe, that prepared and signed receipts were sent out for these premiums to Mr. Ferguson

and that the custom was to forward the same to the agent at Evansville? A It was, yes.

RQ To be delivered to the insured, if he pay? A Yes sir.

RQ What becomes of them if they are not paid? A If they are not paid they are returned by Mr. Lowenthal to Mr. Ferguson, the agent.

RQ What does Mr. Ferguson do with them?

Mr. Denton: Wait a moment. I don't think that is competent as to what the custom is.

The Court: I think that is proper to show the course of business, and he may answer the question.

99 A And he in turn returns them to me at the New York office.

RQ Was such a receipt sent out for the premium due on March 5th, 1897? A It was, sir.

RQ What became of it? A It came back uncollected.

RQ Unpaid? A Unpaid.

RQ Then you say the policy was lapsed officially on your books finally on April 30th, 1897? A Yes sir.

RQ Were any further receipts sent out? A For this policy, no.

RQ And no payment was made to anybody so far as you know? A No sir.

RQ And you are the president of the United States Branch of that Company? A Yes sir.

By the Court:

RQ Do you know what became of that receipt after it was returned to New York? A We got it in the office on file as we keep others.

100 RQ Where is it now? A It is now in the possession of my attorney.

By Mr. Newberger:

RQ It has not yet been paid? A No, it has not been paid. Not at that time nor later.

Mr. Newberger: The Reporter may identify this receipt.

Said receipt is identified by the Reporter as Exhibit K.

RQ You may look at the receipt I now hand you, marked Exhibit K, and tell the court what it is? A This Exhibit K is the original receipt we sent to Mr. Ferguson for collection of the premium due by Mr. Meinert on this policy.

Mr. Newberger: I will offer this receipt in evidence, and let the Reporter show that the receipt was produced by Mr. Frey, the attorney for the defendant.

ipt. Said receipt so offered in evidence, marked by the Reporter Exhibit K, is now read in evidence, and the same is in the words and figures following; to-wit:

101 EXHIBIT K.

RECEIPT.

217 Law Ave. Evansville Ind.

NEDERLAND LIFE INSURANCE COMPANY (L'T'D.)
United States Branch.
874 Broadway, New York City.

Premium $25.25
due Mch 5/97

R. No. 19029

Received Twenty five and 25/100 Dollars being the Quarterly premium on Policy No. 58021 on the life of William Meinert for the continuance of said Policy until June 5th 1897.

L. I. DUBOURCQ,
President U. S. Branch.

A. TREANPOSBAUM
Treasurer.

(Said notice is countersigned and dated across the left hand end as follows; to-wit:)

Countersigned Ind
and dated .....
T & Lp 15 5000 Ren

(On the reverse side thereof appears the following:)

NOTICE TO POLICYHOLDERS.

All premiums are due and payable at the Branch Office of the Company, in the City of New York, on the dates fixed in
102 the policy, for which receipts will be given signed by the President and Treasurer.

Agents and other persons may be authorized to collect the premiums and to deliver receipts for same, (signed as stated above,) but no receipt so given shall be valid unless countersigned by the persons so authorized. No payments made by any person, except in exchange for such receipt, will be recognized by the Company.

(Across the face of said Receipt is stamped the word—LAPSED.)

* * * *

Re-cross Examination:

Questions by Mr. Denton:

RXQ Did you ever notify Mr. Meinert in any way of this receipt having been sent to Mr. Lowenthal? A He was apprised of that by the stamp on the blue card.

RXQ Of its having been sent to Mr. Lowenthal? A Of its being payable to Mr. Lowenthal.

RXQ Then that thirty-days notice that you sent out is not the notice you have testified to? It has something else on there? A Yes sir.

103 RXQ It has a stamp in addition? A It has a stamp on it, stamped in the Chicago office.

RXQ How do you know it was stamped there? A Because it was told to me.

RXQ You don't know anything about it except what was told to you? A They had instructions to do it in that way.

RXQ After you sent it from the New York office to the Chicago office they stamped something else on it? A They stamped to whom it was payable.

RXQ Did they stamp on the notice sent to Meinert that it was payable to Lowenthal and Company? A On the blue notice, they did.

RXQ That is your opinion about it. You don't know? A That is what they told me they did; that they followed the rule.

RXQ So far as you know personally, after the receipt was sent out to Mr. Lowenthal, you don't know that any notice was ever given to Mr. Meinert that it was payable to Mr. Lowenthal? A No, I don't know.

RXQ The notice, then, that the mailing clerk makes affidavit to have mailed, is not the notice that was sent out? A The same form.

RXQ The same form, but it did not have the same con-
104 tents, did it? A The same contents, except the stamp on it; it did not change the conetns of it at all.

(Witness Excused.)

PHILIP W. FREY, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination:

Questions by Mr. Newberger:

Q Your name is Philip W. Frey and you are an attorney practicing in Evansville, Indiana? A Yes sir.

Q Mr. Frey, I believe you prepared and filed the third paragraph of answer and amended third paragraph of answer in this case. A I did, yes sir.

Q Subsequently there was a change made in the form of notice as would be and as it appears in the sixth and seventh paragraphs of answer. I will ask you to tell the court how that change happened to occur? A Because of the receipt of information from the president of the Company that I had founded the answer upon a form of notice which was not the notice which had been sent to William Meinert.

105 Q Will you tell the court when and how that information reached you? A I can. That information reached me by telegram on February 11, 1902, by a telegram from Mr. Dubourcq.

Q When did you subsequently get another form of notice? A That telegram confirmed by a letter of the same date, February 11th.

Q In the confirmatory letter was there enclosed a form of notice? A There was enclosed a blue form of notice, which was subsequently used in the subsequent answer.

Q The form which you used in the third paragraph of answer and amended third paragraph of answer was the form originally sent to you? A Yes sir. You mean in the answers which were filed before the receipt of this telegram?

Q Yes. A Yes sir.

(Witness Excused.)

* * * * *

Rowland Evans,
Stenographer U. S. Courts,
Government Building,
Indianapolis, Ind.

106 JAMES T. FULKER, a witness on behalf of defendant, being first duly sworn, testified as follows:

Examination in Chief:

Questions by Mr. Newberger:

Q You may state your name to the court. A James T. Fulker.

Q Where do you reside? A Chicago.

Q Have you been connected with the Nederland Life Insurance Company, Limited? A Yes.

Q How long? A Well a little over six years.

Q In what office? A Chicago office.

Q Whose office is that? A Edward A. Ferguson.

Q And what relation does he bear to the company? A General Western Manager of the Company.

Q Does that include the territory of Indiana? A Yes.

107 Q The State of Indiana, not territory. A Yes sir.

The Court: For commercial purposes I reckon it is the territory of Indiana.

Mr. Newberger: I was afraid of the record.

Q What do you do if anything with sending out notices, and what did you do with sending out a notice to William Meinert in the spring of 1897? A I received the notices from New York, checked them up, listed them, addressed the envelopes, stamped them and mailed them.

Q When did you get them? A I received them on February 11th.

Q 1897? A 1897.

Q How many were there altogether if you know? A Two hundred and eight, with three assignees notices in addition to the two hundred and eight.

Q I now show you exhibit G and also exhibit F and ask you whether you have used these two forms or either of them; whether you used these two forms or either of them in sending out the notice to William Meinert and others? A The only form I recognize at all is the form G. I do not know the form F at all.

108 Q When did you begin work? A I began work in January of 1896.

Q Now when did you say you sent these notices out? A I sent these out in March 1897.

Q You say March? A February, 1897; February 15th.

Q You say you stamped the notice. Do you recall what stamp you put on it? A Yes I put on it "this premium is payable to"—that is stamped on and then I would write in red ink the agent it was sent to; this was H. Lowenthal and Company Evansville, Indiana.

Q That was stamped on the notice that came from New York? A Yes sir.

Mr. Denton: We object, if your Honor please. They are trying to prove a different kind of notice than the one they plead. They set up a certain kind of notice in the sixth paragraph of answer; they plead another one in the seventh; now after pleading a specific form of notice in their sixth paragraph of answer they are proving a different notice from the one pleaded. If this is offered in evidence, we object to it as not within the issues.

The Court: It is already in evidence. It was offered in evidence this morning as I recollect it.

109 Mr. Newberger: It is the same one exactly, but we are just proving what occurred in Chicago and what was done with it.

Q Was that stamped with a rubber stamp? A I stamped with a rubber stamp "this premium is payable to", then I would write in red ink the name of the agent I sent it to.

Q What did you write in there? A H. Lowenthal and Company, Evansville, Indiana.

Q It was finished and completed in that way when you mailed it? A Yes sir.

Q Did you mail anything else to anybody at the same time? A I mailed all the rest of the notices.

Q I don't mean to anybody else, but did you mail any receipt to Mr. Lowenthal? A Yes sir, on the 26th of February I sent the receipt to Mr. Lowenthal for collection.

Q Is that the receipt that was shown here as having come back without being paid? A Yes sir.

Cross-Examination:

Questions by Mr. Denton:

XQ Did you ever come across any of these notices that were
110 stamped "pay to Edward A. Ferguson, Reliance Building, Chicago, Illinois?" A That was stamped across any that did not go to agents for collection; but anything in Mr. Lowenthal's

territory went to Mr. Lowenthal. If we did not have any general agent in any territory it was stamped that way.

Q So in this case you did not stamp across the notice "pay to Edward A. Ferguson?" A No sir.

Q You are sure of that? A Sure, because I sent it to Lowenthal, for collection, and I would not stamp across it payable to Edward A. Ferguson when Lowenthal had the receipt.

Q Then the notice that you made affidavit that you sent him here is not the notice that you actually sent? A When I made that affidavit this morning I understood I was making affidavit as to the kind of notices that I received from New York.

Q You did not intend this to be an affidavit as to the kind of notice you sent to Meinert, but the notice you said you had received from New York? A The one I received from New York and I forwarded that to Meinert with the addition of the rubber stamp.

By the Court:

111 Q What was put on by the rubber stamp? A "This premium is payable to",—and then I would write in red ink who it was, sir.

By Mr. Denton:

Q Now as a matter of fact, you have no personal recollection of having written Lowenthal and Company on this notice to Meinert, have you? You are testifying to the general course of business, aren't you? A By looking up the record and seeing that I sent the notice to Lowenthal and Company I know I wrote it in.

Q You are forming that opinion from your records, and from your general course of business and not from any independent recollection? A I cannot recollect all of them that far back; of course not.

Q You don't remember the names of all parties you sent notices to? A I know I sent the notice to Meinert because I have it listed down.

Q At the time you sent these notices out did you make out an affidavit and put it on file? A Yes.

Q Is this a copy of the affidavit you made out and put on file? A. No.

112 Q. What is the difference? A Why the affidavit doesn't contain all that—

Mr. Newberger: Let the affidavit show for itself.

Mr. Denton: Well, where is it? Let us see it. Have you the affidavit?

Q Have you the affidavit that you put on file at the time of mailing this notice, Mr. Fulker?

Mr. Newberger: (Hands book to witness) Is that the record?

The Witness: Yes, that is in by handwriting.

Q You say you mailed this notice on the fifteenth? A Fifteenth of February.

Q What is this column used for? (Counsel calling witness' attention to the book) A That is the date the premiums are due.

Q The date they are due, not the date of mailing them? A No, that is the date the premiums are due.

Q Now is it specified anywhere here on the record when that notice was mailed? A No it isn't specified except that it was mailed in February. The date isn't in.

Q Where iss it specified it was mailed in February? A (Indicating on book) February. I neglected to fill in the date. I ought to have put in the fifteenth.

113 Q This column isn't used for the date you mailed them.? A No, I prepared this as soon as I received them and I listed them, and I haven't filled in the date there except in February; I haven't filled in the date.

Witness Excused.

Whereupon the Defendant Rested its case.

114 EVIDENCE IN REBUTTAL.

G. K. DENTON, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination by Larz A. Whitcomb, Esq.

Q State your name to the Court please. A G. K. Denton.

Q What is your business? A Lawyer.

Q Where are you located? A Evansville, Ind.

Q How long have you lived at Evansville, Indiana? A About eight years.

Q Do you know anything about the arrival of mails in Evansville from Chicago at this time? A I do.

Q If a letter should be mailed in Chicago on one day, when would it arrive in Evansville, the next day? A It will get there the next morning, if mailed any time before eleven-thirty at night; it will get there at nine-thirty the next day and be delivered that morning.

Cross-Examination by Mr. Newberger:

XQ You had the common carrier system in Evansville in
115 the year 1897? A Yes.

Q Are there deliveries on Sunday to places of business? A No.

Q If a letter is mailed in Chicago on Saturday, when would it likely be delivered in Evansville? A Well the first mail Monday morning.

Q What time? A Seven o'clock mail. It may be a little later on the outskirts of the city, perhaps eight.

Q Have you looked at the almanac or do you know that April fourth, 1897, was on Sunday? A No, I don't know what day it was.

Witness excused.

Mr. Denton: We want to introduce in evidence also the third paragraph of answer; the original third paragraph and the amended third paragraph of answer.

The Court: Well, you introduced it this morning.

Mr. Denton: Yes, we did. Your Honor is right.

And this was all the evidence given in the cause.

116 And be it further remembered that on the 30th day of June, 1902, the following proceedings were had in said cause.

This cause having been submitted to the Court for trial, the parties hereto having filed an agreement in writing, waiving the right to trial by jury, the Court finds the facts established by the evidence to be as follows:

1. On March 5, 1896, the defendant, The Nederland Life Insurance Company, Limited, issued its policy of insurance for five thousand dollars to William Meinert, payable upon his death to his wife, Mary Meinert, the plaintiff herein, a true and correct copy of which said policy of insurance is filed with with the complaint and is made a part hereof, under and pursuant to the statutes of the State of Indiana.

2. The Court further finds that four (4) quarterly installments of premium of $25.25 each were duly paid by the assured on or before the fifth days of March, June, September and December in the year 1896, and that no other installments of premium on said policy were ever paid.

3. The Court further finds that Article II on the back of the policy, which by an express provision contained in the body of the policy is made a part of the contract of insurance, provides as follows:

"In case of non-payment of any annual premium or installment thereof within thirty days after the same shall fall due, this policy shall be null and void, subject, however, to provisions as to cash surrender and paid up policy values. The company will, however, as a matter of favor and not of right, mail notice to the insured
117 or the assignee at the last address furnished by him or them to the company, to the effect that the policy may be re-established by the payment of the annual premium or installment thereof still due, within ten days after mailing notice".

4. The application for insurance expresly declares and provides that the contract of insurance contained in the policy and in the application shall be governed by the laws of the State of New York relating to life insurance.

5. The assured, William Meinert, died on March 24, 1900, and the proofs of death loss as required by the said policy of insurance were waived by the defendant.

6. At the time said William Meinert took out said policy of insurance, and from that time to the time of his death, he was a resident of Evansville,, Indiana, and his post office address was 217 Law Avenue, Evansville, Indiana.

7. On February 15, 1897, the defendant mailed at Chicago, Illinois, the following notice enclosed in an envelope and duly stamped and properly addressed to William Meinert, 217 Law Avenue, Evansville, Indiana.

NEDERLAND LIFE INSURANCE CO (LD.)
Established in Amsterdam, (Holland) 1858.
United States Branch,
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

The conditions of your policy provides that unless such premium shall be paid at the United States Branch Office of the Company, or to a person authorized to collect such premium holding the Company's receipt therefor, by or before that date, the policy and
118 all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ,
President U. S. Branch.

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premium.

If this notice was not properly addressed, give changed address.

No.....Street.....Name Post Office.....

County of.....State of.....

Names .....

Which said notice was duly received by William Meinert on February 16th, 1897, more than fifteen and less than forty five days prior to March 5th, 1897, and neither said Meinert nor any one on his behalf ever paid said installment of premium on March 5, 1897, or at any time thereafter.

8. The Court further finds that on Saturday, April 3, 1897, the Nederland Life Insurance Company, Limited, duly sent by mail from Chicago, Illinois, to the assured, William Meinert, a notice in the words and figures following.

"NEDERLAND LIFE INSURANCE CO., LIMITED,

Established 1858, Amsterdam, (Holland)

United States Branch, 874 Broadway, New York.

119 New York, April 3, 1897.

William Meinert,

217 Law Ave, Evansville, Ind.

Dear Sir: The premium on your policy which fell due on the 5th of March has not been paid and the policy is therefore null and void. I beg to inform you, however, that if the same is paid within ten days your policy will be reinstated.

L. I. DUBOURCQ,

President.

Policy No. 58021".

which said notice was received by William Meinert in due course of mail at or about eight o'clock, A. M., on Monday April 5, 1897, and said Meinert never acknowledged the receipt of said notice and never took any steps to have said policy reinstated.

9. The Court finds that on April 22nd, 1897, the Nederland Life Insurance Company, Limited, entered on the appropriate records of its office a declaration that said policy Number 58021 was forfeited and lapsed for failure to pay installment of premium.

10. The Court finds that said policy was at the time of bringing this action, and still is, in full force, and that the plaintiff is entitled to recover the amount of said policy unless, on the facts found herein, said policy was forfeited and lapsed under and pursuant to the above mentioned statute of the State of New York.

11. The Court finds that the amount now due and owing on said policy amounts to the sum of four thousand nine hundred and eighty five dollars and five cents ($4985.05)

JOHN H. BAKER,
Judge.

The Court states as conclusions of law on the facts found as aforesaid:

1. That the policy sued on is now and was at the begin-
120 ning of this action, in full force and effect.

2. That said policy has not been forfeited, nor has it lapsed under and pursuant to the provisions of Chapter 690 of the Insurance Law of 1892 of the State of New York.

3. That the plaintiff, Mary Meinert, is entitled to recovery of and from the defendant, The Nederland Life Insurance Company, Limited, the sum of fourt thousand nine hundred eighty five dollars and five cents ($4985.05) with six per cent interest thereon from this date, and costs of suit, and is entitled to have judgment entered accordingly.

JOHN H. BAKER,
Judge.

And at the time the foregoing findings and conclusions of law are made, and before judgment is entered thereon, the defendant excepts and objects thereto for the following reasons:

First. That the said findings of fact are contrary to the evidence.

Second: That the said conclusions of law are contrary to law.

Third: Because the evidence does not show that the notice set forth in the seventh finding of fact was sent as therein stated, and does show that the notice sent and received as stated in said seventh finding was as follows.

NEDERLAND LIFE INSURANCE CO. (LD.)
Established in Amsterdam (Holland) 1858.
United States Branch,
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the
121 Company, or to a person authorized to collect such premium, (holding the Company's receipt therefor) the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ,
President U. S. Branch.

Mr. William Meinert,
#217 Law Avenue,
Evansville, Ind.

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premium.

If the notice was not properly addressed, give changed address. No.....Street.....Name Post Office.....
County of.....State of.....

Fourth. Because on the facts as found the policy sued on is not in force and was not in force at the beginning of said action, and the Court erred in its first conclusion of law.

Fifth. Because on the facts as found the plaintiff, Mary Meinert, is not entitled to recover upon said policy, and the Court erred in its third conclusion of law.

122 Sixth. Because on the facts as found the policy in suit had been forfeited under Chapter 690 of the Insurance Law

of 1892 of the State of New York, and the Court erred in its second conclusion of law.

Seventh. Because upon the evidence and the law the policy in suit was forfeited under said Chapter 690 of the Insurance Law of 1892 of the State of New York, and the Court should have so found the facts and so concluded.

And the defendant, by its attorneys, now asks for time to prepare and file a bill of exceptions and is now allowed by the Court until October 1, 1902, to prepare, present and file such bill.

And before judgment is entered upon said findings and conclusions of law, the defendant now files its motion for a new trial in the words and figures following:

Comes now the defendant by Philip W. Frey and Morris and Newberger, its Attorneys, and moves the Court for a new trial in the above entitled cause for each of the following reasons:

First: For that each and all the findings of the Court are contrary to the evidence.

Second. For that the particular finding of the Court numbered 7, is contrary to the evidence in this respect and particular, that is to say, the evidence proves and shows by a fair preponderance and without material contradiction or uncertainty that the notice sent and received as stated in said seventh finding was different from the notice set forth in said finding and was in the words and figures following.

NEDERLAND LIFE INSURANCE CO. (LD.)
Established in Amsterdam (Holland) 1858.
United States Branch,
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of
123 the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

Unless such premium be paid in accordance with the conditions of your policy, at the United States Branch Office of the Company, or to a person authorized to collect such premium (holding the Company's receipt therefor) the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.

L. I. DUBOURCQ,
President U. S. Branch.

Mr. William Meinert,
#217 Law Avenue,
Evansville, Ind.

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

(Over)

ATTENTION.

No payment of premium made to any person, except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

If the notice was not properly addressed, give changed address.

No.....Street..... Post Office .....

County of.....State of.....

124 Third. For that each and all the several findings of the Court are not sustained by the evidence.

Fourth. For that, in particular, the seventh finding is not sustained by the evidence in respect to the form and contents of the notice actually sent and received as stated in said finding, but the notice actually sent and received as shown by the evidence was different in tenor and effect from that so set forth.

Fifth. For that the decision and judgment of the Court are contrary to the law and evidence.

PHILIP W. FREY and
MORRIS AND NEWBERGER,
Attorneys for Defendant.

Which motion is overruled by the Court, to which ruling by the Court the defendant, by its attorneys, at the time excepted and prayed time to file a bill of exceptions, and the Court now allows it, said defendant, until October 1, 1902, in which to prepare, present and file such bill of exceptions.

Thereupon it is considered by the Court that the plaintiff, Mary Meinert, recover of the defendant, Nederland Life Insurance Company, Limited, the sum of fourt thousand nine hundred eighty five dollars and five cents ($4985.05) with interest at the rate of six (6) per cent per annum from this date and with her costs taxed at ..... dollars; to which the defendant at the time excepts and

objects for the reason that the same is contrary to the evidence and the law; and the defendant is now granted until October 1, 1902, to prepare, present and file its bill of exceptions.

But the Court orders that no execution shall issue upon said judgment until October 1, 1902.

All of which is finally considered and adjudged by the Court.

125 And now in furtherance of justice and that right may be done, the defendant, within the time limited, now presents and tenders this, its bill of exceptions, as a bill of exceptions for each and all of the exceptions above stated and prays that the same may be settled and allowed as a bill of exceptions for each of said exceptions, and that the same be signed and certified by the judge and made part of the record as provided by law.

All of which is now done and allowed this 29th day of September, 1902.

JOHN H. BAKER,
Judge.

rit of Sept.

126 And afterwards towit; at the May Term of said Court, on the 30th day of September, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the defendant by counsel and files its petition for a writ of error and its assignment of errors herein, in the words following towit.

The Nederland Life Insurance Company, Limited, defendant in the above entitled cause, feeling itself aggrieved by the finding and judgment of the Court, entered on the 30th day of June, 1902, comes now by Philip W. Frey and Morris and Newberger its Attorneys, and prays said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Seventh Circuit under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the seventh Circuit.

And your petitioner will ever pray.

PHILIP W. FREY,
MORRIS AND NEWBERGER,
Attorneys for the defendant.

Appeal allowed Sept. 30th, 1902.

J. H. BAKER,
Judge.

ASSIGNMENT OF ERRORS.

Comes now the defendant in the above entitled cause, by Philip W. Frey, and Morris and Newberger, its Attorneys, and files
127 the following assignment of errors upon which it will rely its prosecution of writ of error in said cause:

1. That the United States Circuit Court, in and for the District of Indiana, erred in sustaining the demurrer interposed by the plaintiff and defendant in error to the second paragraph of the answer filed in said cause by the defendant and plaintiff in error to the amended complaint; and by holding and deciding that the facts stated in said answer filed were not sufficient to constitute a defense to the cause of action in plaintiff's amended complaint contained.

2. That the said Court erred in sustaining the demurrer interposed by the plaintiff and defendant in error to the third paragraph of the answer filed in said cause by the defendant and plaintiff in error to the amended complaint; and by holding and deciding that the facts stated in said answer filed were not sufficient to constitute a defense to the cause of action in plaintiff's amended complaint contained.

3. That the said Court erred in sustaining the demurrer interposed by the plaintiff and defendant in error to the fourth paragraph of the answer filed in said cause by the defendant and plaintiff in error to the amended complaint; and by holding and deciding that the facts stated in said answer filed were not sufficient to constitute a defense to the cause of action in plaintiff's complaint contained.

4. That the said Court erred in overruling the motion of the defendant and plaintiff in error for a new trial as filed by it in said cause on June 30th, 1902.

5. That the said Court erred in overruling the motion of the defendant and plaintiff in error for a new trial on the ground that the particular finding of the Court No. 7 is contrary to the evidence in respect to the notice found to have been sent and received in said finding.

6. That the said Court erred in overruling the motion
902. 128 of the defendant and plaintiff in error for a new trial on the ground that the 7th finding of the Court is not sustained by the evidence in respect to the form and contents of the notice actually sent and received, as stated in said finding.

7. That the said Court erred in its conclusions of law upon its findings of fact, which conclusions of law are contrary to law.

8. That the said Court erred in its first conclusion of law on the facts as found by the Court, and in holding that the policy sued on at the beginning of the action was in full force and effect.

9. That the said Court erred in its second conclusion of law on the facts as found by the Court, and in holding that the policy sued on in this action had not been forfeited or lapsed under and pursuant to the provisions of Chapter 690 of the Insurance Law of 1892 of the State of New York, and in not holding that said policy had been forfeited and had lapsed because no premium, or installment of premium, had been paid thereon, as found by the Court, subsequent to the 5th day of December, in the year 1896, and because, as found by the Court, the defendant, on February 15th, 1897, mailed to William Meinert the insured, a notice substantially conforming to said Chapter 690, being the notice copied in the 7th finding of the Court.

10. That said Court erred in rendering judgment against the defendant in said cause, the plaintiff in error, upon the findings of fact and conclusions of law of the Court, and said judgment is contrary to law and the facts as found by the Court.

Wherefore the said defendant and plaintiff in error prays that the judgment of said Court be reversed and such directions be given that full force and efficacy may inure to the defendant by rea-
129 son of the defense set up in its paragraphs of answer aforesaid; and also by reason of the defense disclosed by the findings of fact of the Court.

PHILIP W. FREY,
MORRIS AND NEWBERGER,
Att'ys for defendant.

And afterwards, to-wit; at the May Term of said Court, on the 30th day of September, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Upon motion of Philip W. Frey and Morris and Newberger attorneys for the defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed, in the United States Circuit Court of Appeals for the Seventh Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at $6,000.00.

And the said defendant is now granted ten days within which to file said bond, with surety to be approved by this Court, during which time and after the filing of such bond until the determination of said writ of error, all proceedings in this Court are stayed and suspended.

And afterwards, towit; at the May Term of said Court, on the 4th day of October, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the defendant by counsel and files an appeal bond herein in the sum of $6,000. with the United States Fidelity and Guaranty Company as surety thereon, which bond is approved by the Court and is in the words following towit.

Know all Men by these Presents: That we, The Nederland Life Insurance Company, Limited, and the United States
130 Fidelity and Guaranty Company, having an office and usual place of business at No. 140 Broadway, in the City of New York, are held and firmly bound unto the above Mary Meinert, in the sum of Six thousand dollars ($6,000.), to be paid to the said Mary Meinert, to which payment well and truly to be made, we bind ourselves, jointly and severally, and our and each of our successors and assigns, jointly by these presents.

Sealed with our seals, and dated this 2nd day of October, one thousand nine hundred and two.

Whereas, the above named The Nederland Life Insurance Company, Limited, hath prosecuted a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the judgment rendered in the above entitled suit, by the Circuit Court of the United States for the District of Indiana.

Now, therefore, the condition of this obligation is, that if the above named The Nederland Life Insurance Company, Limited, shall prosecute its said Writ of Error to effect and answer all costs and damages that may be adjudged or awarded against it, if it shall

fail to make good its plea, then this obligation to be void; otherwise, in full force.

NEDERLAND LIFE INSURANCE COMPANY,
LIMITED,

L. I. DUBOURCQ,
[SEAL] *Attorney in fact.*

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By SYLVESTER J. V. SULLIVAN,
[SEAL] , *Manager.*

Attest:
G. TERRY SINCLAIR
Attorney-In-Fact.

Sealed and delivered in the presence of
A. W. BUQUEM.

131 Approved this October 4th, 1902.
JOHN H. BAKER,
Judge.

State of New York, }
County of New York, } s.s.

On this 2nd day of October, 1902, before me personally appeared Louis I. Dubourcq, Attorney-in-fact of the Nederland Life Insurance Company, Limited, with whom I am personally acquainted, who being by me duly sworn said: That he resies in the State of New York; that he is the Attorney-in-fact of The Nederland Life Insurance Company, Limited, the corporation described in and which executed the above instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such seal; that it was so affixed by the order of the Board of Directors of sand Company; and that he signed his name thereto as Attorney-in-fact by like authority.

FLORENCE J. WALSH
[SEAL.] *Notary Public for Kings Co.*

AMENDED CERTIFICATE FILED IN NEW YORK CO.

County of New York, } s.s.
State of New York, }

I, Thomas L. Hamilton, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record do hereby certify that Florence J. Walsh has filed in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the proof or acknowledgement of the annexed instrument, duly authorized to take the same. And further that I am well
132 acquainted with the handwriting of such Notary, and believe the signature to the said certificate of proof or acknowledgement to be genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 2nd day of Oct. 1902.

THO'S. L. HAMILTON,
Clerk.

[SEAL]

AFFIDAVIT, ACKNOWLEDGEMENT AND JUSTIFICATION BY THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

State of New York, } s.s.
County of New York, }

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of The Nederland Life Insurance Company, Limited, as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity and Guaranty Company and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the Act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of The Nederland Life Insurance Company, Limited, is the corporate seal of said The United States Fidelity and

Guaranty Company, and wa thereto affixed by order and authority of the Board of Directors of said company; and that he signed his name thereto by like order and authority as Manager, of said company; and that he is acquainted with G. Terry Sinclair, and knows him to be the Attorney in Fact of said company; and
133 that the signature of said G. Terry Sinclair, subscribed to said bond is in the genuine handwriting of said G. Terry Sinclair, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceeds its claims, debts and liabilities of every nature whatsoever, by more than the sum of one million dollars. ($1,000,000.00)

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 2nd day of October, 1902.

JAMES P. WRIGHT,
[SEAL.] *Notary Public Kings County.*
Certificate filed in N. Y. County.

County of New York, } s.s.
State of New York, }

I, Thomas L. Hamilton, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that James P. Wright has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 2nd day of Oct, 1902.

THO'S. L. HAMILTON,
[SEAL] *Clerk.*

134 And afterwards, towit; at the May Term of said Court, on the 25th day of October, 1902, before the Honorable John H. Baker, Judge of said Court, the following further proceedings in the above entitled cause were had, towit.

Comes now the defendant by counsel and shows to the Court that the Clerk will not be able to prepare the transcript of the record and proceedings in the above entitled cause on or before the return day, and thereupon it is ordered by the Court that the time within which the above entitled cause may be docketed and the record thereof filed with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit be, and the same is hereby enlarged and extended to the 25th day of November, 1902.

2 UNITED STATES OF AMERICA.

The President of the United States of America, to the Judges of the Circuit Court of the United States for the District of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said Circuit Court, before you, between Mary Meinert and The Nederland Life Insurance Company, Limited a manifest error hath happened to the great damage of the said plaintiff as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same at Chicago, thirty days after the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 25th day of October A. D. 1902.

[SEAL.]

NOBLE C. BUTLER,
Clerk.

135 United States of America, } ss:
District of Indiana. }

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the above entitled cause as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said Court, at Indianapolis in said District, this 11th day of November, A. D. 1902.

NOBLE C. BUTLER,
[SEAL] *Clerk.*

1 LAW.

UNITED STATES OF AMERICA.

To Mary Meinert Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago thirty days after the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Indiana wherein The Nederland Life Insurance Company, Limited, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness The Hon. John H. Baker, Judge of the District Court of the United States for the District of Indiana, and ex-officio Judge of said Circuit Court, this 25th day of October in the year of our Lord, one thousand nine hundred and two.

JOHN H. BAKER,
[SEAL] *Judge.*

Nov. 6th 1902 Service is hereby acknowledged

LARZ A. WHITCOMB
Attorney for Deft in Error.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages numbered from 1 to 98, inclusive, is a copy of the printed record filed in this court on December 29, 1902, which was prepared for the printed, indexed, supervised and distributed by me in accordance with the rules of this court, and upon which the cause was determined by the United States Circuit Court of Appeals for the Seventh Circuit, in cause No. 945, The Nederland Life Insurance Company, Limited, v. Mary Meinert.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of March, A. D. 1904.

(SEAL.)

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the City of Chicago, in said Seventh Circuit, on Tuesday, the seventh day of October, 1902, of the October term in the year of our Lord one thousand nine hundred and two and of our Independence the one hundred and twenty-seventh year.

And afterwards, to-wit: On the twenty-eighth day of November, 1902, in the October term last aforesaid, came the Plaintiff-in-error, by its counsel Mr. Nathan Morris, Mr. Louis Newberger, Mr. Philip W. Frey and Messrs. Strong & Cadwalader, and filed in the office of the clerk of this court their appearances, said appearances being in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 945 October Term, 1902.

The Nederland Life Insurance Company,
Plaintiff-in-error,
vs.
Mary Meinert.

The Clerk will enter my appearance as Counsel for the plaintiff-in-error.

NATHAN MORRIS
LOUIS NEWBERGER
PHILIP W. FREY
STRONG & CADWALADER.

ENDORSED: Filed Nov. 28, 1902.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the second day of December, 1902, in the October term last aforesaid, came the defendant-in-error by her counsel Mr. Larz A. Whitcomb, and filed in the office of the clerk of this court his appearance, said appearance being in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 945. October Term, 1902.

The Nederland Life Insurance Company,
Plaintiff-in-Error,
vs.
Mary Meinert.

The Clerk will enter my appearancee as Counsel for the defendant-in-error.

LARZ A. WHITCOMB.

ENDORSED: Filed Dec. 2, 1902.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the fifteenth day of December, 1902, a in the October term last aforesaid, came the defendant-in-error by her counsel, Mr. Albert J. Beveridge, and filed in the office of the clerk of this court his appearance, said appearance being in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 945. October Term 1902.

The Nederland Life Insurance Company,
Plaintiff-in-error,
vs.
Mary Meinert.

The Clerk will enter my appearance as Counsel for the defendant in error.

ALBERT J. BEVERIDGE.

ENDORSED: Filed Dec. 15, 1902.

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the twenty-third day of December, 1902, in the October term last aforesaid, came the defendant-in-error by her counsel, Mr. G. K. Denton, and filed in the office of the clerk of this court his appearance, said appearance being in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, 1902.

No. 945.

The Nederland Life Insurance Company,
Plaintiff-in-error,
vs.
Mary Meinert.

The Clerk will enter my appearance as Counsel for the defendant in error.

G. K. DENTON.

ENDORSED: Filed Dec. 23, 1902.

EDWARD H. HOLLOWAY,
Clerk.

And afterwards, to-wit: On the twentieth day of January, 1903, in the October term last aforesaid, there was filed in the office of the clerk of this Court a certain stipulation of counsel in the above entitled cause, which stipulation is in the words and figures following to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

The Nederland Life Insurance Company (Limited)
vs.
Mary Meinert.
} No. 945.

The undersigned counsel for appellant and appellee in the above entitled appeal do hereby stipulate and agree that the annexed part of the record in said cause, inadvertently omitted by the Clerk thereof from the transcript in this appeal, and wherein it appears that on February 17, 1902, the demurrer of the plaintiff to the fourth paragraph of the answer of the defendant was sustained, to

which ruling of the Court, the defendant, by its attorneys, excepted, shall be deemed and taken to be a part of the record in this appeal to the same extent and as though the same had been originally incorporated in said transcript and printed in the printed record of said appeal No. 945, as originally filed on November 24, 1902, the printed record thereof was filed on December 29, 1902.

Witness our hands this 12th day of January, 1902.

PHILIP W. FREY &
MORRIS & NEWBURGER,
Attys. for Appellant.
G. K. DENTON,
Attys. for Appellee.

Ordered Accordingly Jan. 20 '03.

JAS. G. JENKINS.

Filed Jan 20 1903

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, on the same day, to-wit: On the twentieth day of January, 1903, there was filed in the office of the clerk of this court a certified order of the Circuit Court of the United States for the District of Indiana, entered February 17, 1902, which order is in the words and figures following, to-wit:

IN THE CIRCUIT COURT OF THE UTITED STATES,

FOR THE DISTRICT OF INDIANA.

November Term, 1901, February 17th, A. D. 1902.

Before HONORABLE JOHN H. BAKER, Judge.

Mary Meinert,
vs.
Nederland Life Insurance Company. } No. 10,032, Law,

Come now the parties by counsel and the court having heard the argument of counsel and being sufficiently advised in the premises doth now sustain the demurrer to the 4th paragraph of the answer herein, to which ruling of the court the defendant by its Attorneys now excepts.

United States of America, } ss. :
District of Indiana, }

I, NOBLE C. BUTLER, Clerk of the Circuit Court of the United States for the District of Indiana do hereby certify that the above and foregoing is a full, true and complete copy of an order made and entered in said court on the 17th day of February, 1902, in the above entitled cause as fully as the same appears of record in my office.

Witness my hand and the seal of said court, at Indianapolis in said District, this 8th day of January, A. D. 1903.

NOBLE C. BUTLER,
Clerk.

(Seal.)

Filed Jan 20 1903

EDWARD M. HOLLOWAY,
Clerk.

And afterwards, on the same day, to-wit: On the twentieth day of January, 1903, the following further proceedings were had and entered of record, to-wit:

TUESDAY, January 20, 1903.

Court met pursuant to adjournment.

Present:

HON. JAMES G. JENKINS, Circuit Judge, presiding.
HON. PETER S. GROSSCUP, Circuit Judge.
HON. FRANCIS E. BAKER, Circuit Judge.

945

Nederland Life Insurance Company } Error to the Circuit Court of
vs. } the United States for the
Mary Meinert. } District of Indiana.

Upon the filing of stipulation of counsel it is ordered that the certified copy of the order of February 17, 1902, of the Circuit Court of the United States for the District of Indiana, be, and the same is hereby made a part of the record in this cause in this court.

And afterwards, on the same day, to-wit: On the twentieth day of January 1903, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain petition, which petition is in the words and figures following, to-wit:

UNITED STATES OF AMERICA

IN THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Nederland Life Insurance Company (Limited)
vs.
Mary Meinert. } Appeal No. 945.

TO THE HONORABLE THE JUSTICES OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The plaintiff in error, the Netherland Life Insurance Company, Limited, respectfully shows to the Court:

That the printed record in the above entitled appeal was filed on December 29, 1902, in the office of the Clerk of the Court, that copies of such record were received by Morris & Newberger of counsel at Indianapolis, Indiana, on or about December 31, 1902. That the general counsel for plaintiff in error, Messrs. Strong & Cadwalader, residing in the City of New York, have but recently received the printed copy of said report. Plaintiff in error further says that Mr. Philip W. Frey, of Evansville, Indiana, is one of the counsel for plaintiff in error in said appeal and that he and Morris & Newberger and said Strong & Cadwalader, in New York, all desire to participate in the preparation of brief filed by the plaintiff in error in said cause.

That by reason of the fact that said attorneys reside in different cities, much time is bound to be consumed in preparation of such brief, and by reason of that fact, they ask that forty-five days additional time be given them in which to prepare, have printed and file their brief in the above entitled Appeal.

Your petitioners say that no harm will result to the defendant in said appeal by such delay, inasmuch as the judgment is a money judgment against the plaintiff and in favor of the defendant, bearing interest, and a good and sufficient bond has been given for the

payment thereof in the event said judgment shall be affirmed by this Honorable Court.

NEDERLAND LIFE INSURANCE CO.
By PHILIP W. FREY &
MORRIS & NEWBERGER,
Attys.

LOUIS NEWBERGER, being duly sworn upon his oath, says, that he is one of the counsel in the above entitled cause, and that the matters set forth in the foregoing petition are true as he verily believes.

LOUIS NEWBERGER.

Subscribed and sworn to before me this 16th day of January, 1903.

ALBERT ASCHE
[SEAL] Notary Public.
My commission expires Jan. 5th, 1905.

[ENDORSED:] Filed Jan. 20, 1903. Edward M. Holloway, Clerk

And afterwards, to-wit: On the same day, to-wit: On the twentieth day of January, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, JANUARY 20, 1903

Court met pursuant to adjournment.

Present:

HON. JAMES G. JENKINS, Circuit Judge, presiding.
HON. PETER S. GROSSCUP, Circuit Judge.
HON. FRANCIS E. BAKER, Circuit Judge.

945

Nederland Life Insurance Company, vs. Mary Meinert. } Error to the Circuit Court of the United States for the District of Indiana.

Upon the filing of a petition of counsel for plaintiff in error, it is ordered that the time for filing brief for plaintiff in error in this cause, be, and the same is hereby extended to March 10, 1903.

And afterwards, to-wit: On the fourteenth day of April, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, APRIL 14, 1903.

Court met pursuant to adjournment.

Present:

HON. JAMES G. JENKINS, Circuit Judge.
HON. PETER S. CROSSCUP, Circuit Judge.
HON. FRANCIS E. BAKER, Circuit Judge.

945

Or

Nederland Life Insurance Company, vs. Mary Meinert. } Error to the Circuit Court of the United States for the District of Indiana.

It is ordered by the court that this cause, be, and the same is hereby passed.

TUESDAY, October 6, 1903.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the City of Chicago, in said Seventh Circuit on the sixth day of October, 1903, of the October Term in the year of our Lord one thousand nine hundred and three and of our Independence the one hundred and twenty-eighth.

And afterwards, to-wit: On the sixth day of October, 1903, in the October term last aforesaid, the following further provisions were had and entered of record, to-wit:

TUESDAY, October 6, 1903.

Present :

HON. JAMES G. JENKINS, Circuit Judge presiding.
HON. PETER S. GROSSCUP, Circuit Judge.
HON. FRANCIS E. BAKER, Circuit Judge.

945

Nederland Life Insurance Company, vs. Mary Meinert. } Error to the Circuit Court of the United States for the District of Indiana.

It is ordered by the court that this cause, be, and the same is hereby set down for hearing October 14, 1903.

And afterwards, to-wit : On the fourteenth day of October, 1903, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain stipulation of counsel, which stipulation is in the words and figures following, to-wit :

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 945.

The Nederland Life Insurance Company, Limited, Plaintiff in error,
vs.
Mary Meinert, Defendant in error.

It is hereby agreed and stipulated by the parties hereto that the said cause be submitted to said court on briefs and without oral argument, the right to oral argument being hereby expressly waived.

PHILIP W. FREY &
MORRIS & NEWBERGER.
Attorneys for Plaintiff in error.

Oct. 13, 1903.

ALBERT J. BEVERIDGE
LARZ A. WHITCOMB
D. K. DENTON
Attorneys for Defendant in error.

[ENDORSED :] Filed Oct. 14, 1903. Edward M. Holloway, Clerk.

And heretofore, to-wit: On the twelfth day of October, 1903, in the October term last aforesaid, the following further proceedings were had entered of record, to-wit:

MONDAY, October 12, 1903.

Court met pursuant to adjournment.

Present:

HON. JAMES G. JENKINS, Circuit Judge, presiding
HON. PETER S. GROSSCUP, Circuit Judge.
HON. FRANCIS E. BAKER, Circuit Judge.

ORDER.

It is ordered by the court that the Honorable ROMANZO BUNN, Judge of the District Court of the United States for the Western District of Wisconsin, be designated and assigned to sit in this court as a member thereof during the present session.

And afterwards, to-wit: On the fourteenth day of October, 1903, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, October 14, 1903.

Court met pursuant to adjournment.

Present:

HON. JAMES G. JENKINS, Circuit Judge presiding.
HON. PETER S. GROSSCUP, Circuit Judge.
HON. FRANCIS E. BAKER, Circuit Judge.

Before:

HON. JAMES G. JENKINS, Circuit Judge.
HON. PETER S. GROSSCUP, Circuit Judge.
HON. ROMANZO BUNN, District Judge.

945.

Nederland Life Insurance Company, vs. Mary Meinert. } Error to the Circuit Court of the United States for the District of Indiana.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and the same having been submitted the court takes this matter under advisement.

And afterwards, to-wit: On the fifth day of January, 1904, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the above entitled cause, which opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 945. OCTOBER TERM, A. D. 1902.

The Nederland Life Insurance Company, Limited, *Plaintiff in Error,* vs. Mary Meinert.	Error to the Circuit Court of the United States for the District of Indiana.

Before JENKINS and GROSSCUP, *Circuit Judges*, and BUNN, *District Judge.*

BUNN, *District Judge*, delivered the opinion of the Court.

This is an action to recover upon a policy of life insurance. A jury was waived in the trial court and the cause tried by the court, who made the following finding of facts and conclusions of law:

1. On March 5th, 1896, the defendant, The Nederland Life Insurance Company, Limited, issued its policy of insurance for five thousand dollars to William Meinert, payable upon his death to his wife, Mary Meinert, the plaintiff herein, a true and correct copy of which said policy of insurance is filed with the complaint and is made a part thereof, under and pursuant to the statutes of the State of Indiana.

2. The Court further finds that four (4) quarterly installments of premium of $25.25 each were duly paid by the assured on or before the fifth days of March, June, September and December in the year 1896, and that no other installments of premium on said policy were ever paid.

3. The Court further finds that Article II on the back of the policy, which by an express provision contained in the body of the policy is made a part of the contract of insurance, provides as follows:

"In case of nonpayment of any annual premium or installment thereof within thirty days after the same shall fall due, this policy

shall be null and void, subject, however, to provisions as to cash surrender and paid up policy values. The company will, however, as a matter of favor and not of right, mail notice to the insured or the assignee at the last address furnished by him or them to the company, to the effect that the policy may be re-established by the payment of the annual payment or installment thereof still due, within ten days after mailing notice."

4. The application for insurance expressly declares and provides that the contract of insurance contained in the policy and in the application shall be governed by the laws of the State of New York relating to life insurance.

5. The assured, William Meinert, died on March 24, 1900, and the proofs of death loss as required by the said policy of insurance were waived by the defendant.

6. At the time said William Meinert took out said policy of insurance, and from that time to the time of his death, he was a resident of Evansville, Indiana, and his post-office address was 217 Law Avenue, Evansville, Indiana.

7. On February 15, 1897, the defendant mailed at Chicago, Illinois, the following notice enclosed in an envelope and duly stamped and properly addressed to William Meinert, 217 Law Avenue, Evansville, Indiana:

"Nederland Life Insurance Co. (Ld)
Established in Amsterdam (Holland), 1858.
United States Branch:
874 Broadway, New York City.

Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the Company or to a person authorized to collect such premium holding the Company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid up policy.

L. I. DuBourcq,
President U. S. Branch.

If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.)

ATTENTION.

No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

Please return this notice when you send remittances to the Branch Office or to the person authorized to collect premiums.

If this notice was not properly addressed, give changed address.

No. ---- Street---------- Name Post Office ----------

County of---------- State of ----------

Name----------

which said notice was duly received by William Meinert on February 16th, 1897, more than fifteen and less than forty five days prior to March 5th, 1897, and neither said Meinert nor any one on his behalf ever paid said installment of premium on March 5th, 1897, or at any time thereafter.

8. The Court further finds that on Saturday, April 3, 1897, the Nederland Life Insurance Company, Limited, duly sent by mail from Chicago, Illinois, to the assured, William Meinert, a notice in the words and figures following:

"Nederland Life Insurance Co., Limited.
Established 1858, Amsterdam, Holland.
United States Branch, 874 Broadway, New York.

NEW YORK, April 3rd, 1897.

WILLIAM MEINERT,
217 Law Ave., Evansville, Ind.

DEAR SIR:—The premium on your policy which fell due on the 5th March has not been paid and the policy is therefore null and void. I beg to inform you, however, that if the same is paid within ten days your policy will be reinstated.

L. I. DUBOURCQ,
President.

Policy No. 58021."

which said notice was received by William Meinert in due course of mail at or about 8 o'clock, A. M. on Monday, April 5th, 1897, and said Meinert never acknowledged the receipt of said notice and never took any steps to have said policy reinstated.

9. The Court finds that on April 22, 1897, the Nederland Life Insurance Company, *Limited*, entered on the appropriate records of its office a declaration that said policy Number 58021 was forfeited and lapsed for failure to pay installment of premium.

10. The Court finds that said policy was at the time of bringing this action, and still is, in full force, and that the plaintiff is entitled to recover the amount of said policy unless, on the facts found herein, said policy was forfeited and lapsed under and pursuant to the above mentioned statute of the State of New York.

11. The Court finds that the amount now due and owing on said policy amounts to the sum of four thousand nine hundred and eighty five dollars and five cents ($4985.05).

The Court states as conclusions of law on the facts found as aforesaid:

1. That the policy sued on is now and was at the beginning of this action in full force and effect.

2. That said policy has not been forfeited, nor has it lapsed under and pursuant to the provisions of Chapter 690 of the Insurance Law of 1892 of the State of New York.

3. That the plaintiff, Mary Meinert, is entitled to recover of and from the defendant, the Nederland Life Insurance Company, Limited, the sum of four thousand nine hundred eighty-five dollars and five cents ($4985.05) with six per cent interest thereon from this date, and costs of suit, and is entitled to have judgment entered accordingly.

We think the conclusions of law fully sustained by the finding of facts, and that the judgment must be affirmed. It is clear from the finding of facts and the express terms of the policy that the contract of insurance was to be governed by the laws of the State of New York, and under those laws it is equally clear that the policy was never forfeited, but was still in force at the commencement of the action, as found by the Court. Counsel for the plaintiff in error claims that the stipulations in the contract are too vague to subject the contract to the laws of New York. But the provision of the application is that the contract of insurance contained in the policy and in this application, shall be governed by the laws of the State

of New York, the place of said contract to be the principal office "in the United States of said Company in the State of New York." This is the company's own language and the import is unmistakable. Penn Mutual Life Insurance Company vs. Mechanics' Savings Bank & Trust Company, 72 Fed. Rep., 413. Its principal office in this country was in New York City, where all premiums were to be paid. It was the privilege as it was evidently the policy of the company to have all its contracts of insurance, wherever made, governed by one and the same law. There are many other provisions in the policy relating to the conduct of the business, all of which go to show that it was the understanding of the parties that the business should be done at its branch office in New York, and subject to the laws of that state. The provision that: "Notice is hereby given that the provisions of Section 88 of the Insurance Law 1892 of the State of New York, are waived by the provisions and requirements, referring to the policy", is very significant. There would be no occasion for the company to put in such a provision as that if the laws of New York generally were not to govern the contract.

All of these provisions in the policy forming part of the contract of insurance go to show that the intent of the parties was to make the contract subject to the laws of New York, the same as though made and executed in that state. That this was the understanding of the plaintiff in error is clear from the character of the notice which it sent of the accrual of the premium, beginning as follows: "Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified", &c.

It only remains to inquire whether, under the laws of New York, the policy has been forfeited. It has not been forfeited unless it is by virtue of the express provision in the policy providing for forfeiture. Without a clause providing for a forfeiture the policy is not forfeited for nonpayment of the premium, any more than a land contract is forfeited by nonpayment of principal or interest when due. The rule is laid down in 19 Am. & Eng. Enc. of Law, 2 Ed. 44, as follows: "Since forfeitures are odious in the eyes of the law, a default in the payment of a premium on life insurance does not forfeit the policy where there is no stipulation to that effect in the policy." This is the well settled rule. The reason why forfeitures are odious in the eyes of the law, and are said to be abhorred, is that they are not equitable. Nevertheless, if a policy

of insurance provides in express terms for a forfeiture for nonpayment of the premium when due, the law will enforce it. But before the Court will declare a forfeiture, the conditions of the policy upon which the forfeiture is founded must be strictly complied with. And this brings us to the only remaining question in the case, whether the provisions of the policy in regard to notice of forfeiture have been complied with by the company. This provision is inserted for the benefit of the company. It is the company's language and it cannot complain if the Court, as it will, place a strict construction upon it, to save a forfeiture if possible. If the company has given the notice provided in the contract, then the forfeiture will hold, otherwise not. Phelan v. Northwestern Mutual, etc, 113 N. Y. 147; 20 N. E. 827; 10 American State Report, 441; Schad v. Security Mutual, etc, 42 N. Y. S. 314; 155 N. Y. 640; New York Life Insurance Company v. Dingley, 93 Fed. Rep. 153; Born v. Home Insurance Co. (Iowa) 81 N. W. 676; Smith v. Continental Insurance Company (Iowa) 79 N. W. 126; Providence Savings Life v. Nixon, 73 Fed. Rep. 144; Equitable Life v. Nixon, 81 Fed. Rep. 796; Hicks v. National Life Ins. Co., 60 Fed. Rep. 690.

Under these authorities it seems clear that the notice given in this case was not a substantial compliance with the terms of the policy. Under those terms the premium for nonpayment of which, it is claimed, the policy was forfeited, became due on the 5th day of March, 1897. The condition on the back of the policy provided that: "In case of nonpayment of any premium within *thirty days* after the same shall become due, this policy shall be null and void."

The notice given to the insured by the company was as follows: "Pursuant to chapter 690 of the Insurance Law of 1892, of the State of New York, you are hereby notified that the quarterly premium of $25.25 on policy No. 58021 will fall due on the 5th of March, 1897, if the policy be then in force.

"The conditions of your policy provide that unless such premium shall be paid at the United States Branch office of the Company, or to a person authorized to collect such premium, holding the company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid up policy.

L. I. DuBourcq,
Pres. U. S. Branch."

This notice is evidently far from being a compliance with the contract, and is furthermore quite misleading. The insured is notified that his premium is due the 5th day of March, and unless he pays it "*by or before that day*" his policy will be forfeited and void. Whereas, by the terms of the policy he has thirty days after March 5th in which to pay it. The case of Phelan v. Northwestern Mutual, 113 N. Y. 147 is quite decisive of this question. The defect in the notice given in the case at bar is much more serious than the one given in that case. The case of Schad v. Security Mutual, 42 N. Y. S. 314, affirmed in 155 N. Y. 640, is equally in point and decisive of the law in New York. See also Life Ins. Co. v. Dingley, 93 Fed. 153, decided by the U. S. Circuit Court of Appeals for the Ninth Circuit, which was also a case under the New York Statute.

Judgment *affirmed.*

And afterwards on the same day, to-wit: On the fifth day of January, 1904, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, January 5, 1904.

Court met pursuant to adjournment.

Present:

HON. JAMES G. JENKINS, Circuit Judge, presiding.
HON. PETER S. GROSSCUP, Circuit Judge.
HON. FRANCIS E. BAKER, Circuit Judge.

Before:

HON. JAMES G. JENKINS, Circuit Judge.
HON. PETER S. GROSSCUP, Circuit Judge.
HON. ROMANZO BUNN, District Judge.

945.

Nederland Life Insurance Company, Limited, vs. Mary Meinert.	Error to the Circuit Court of the United States for the District of Indiana.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana.

On consideration whereof, It is now here ordered ond adjudged by this court, that the Judgment of the said circuit court in this cause be, and the same is hereby affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 98 to 117, inclusive, contain a true copy of the papers filed (except briefs of counsel) and proceedings had thereon in the United States Circuit Court of Appeals for the Seventh Circuit in the case of

The Nederland Life Insurance Company, Limited,

vs.

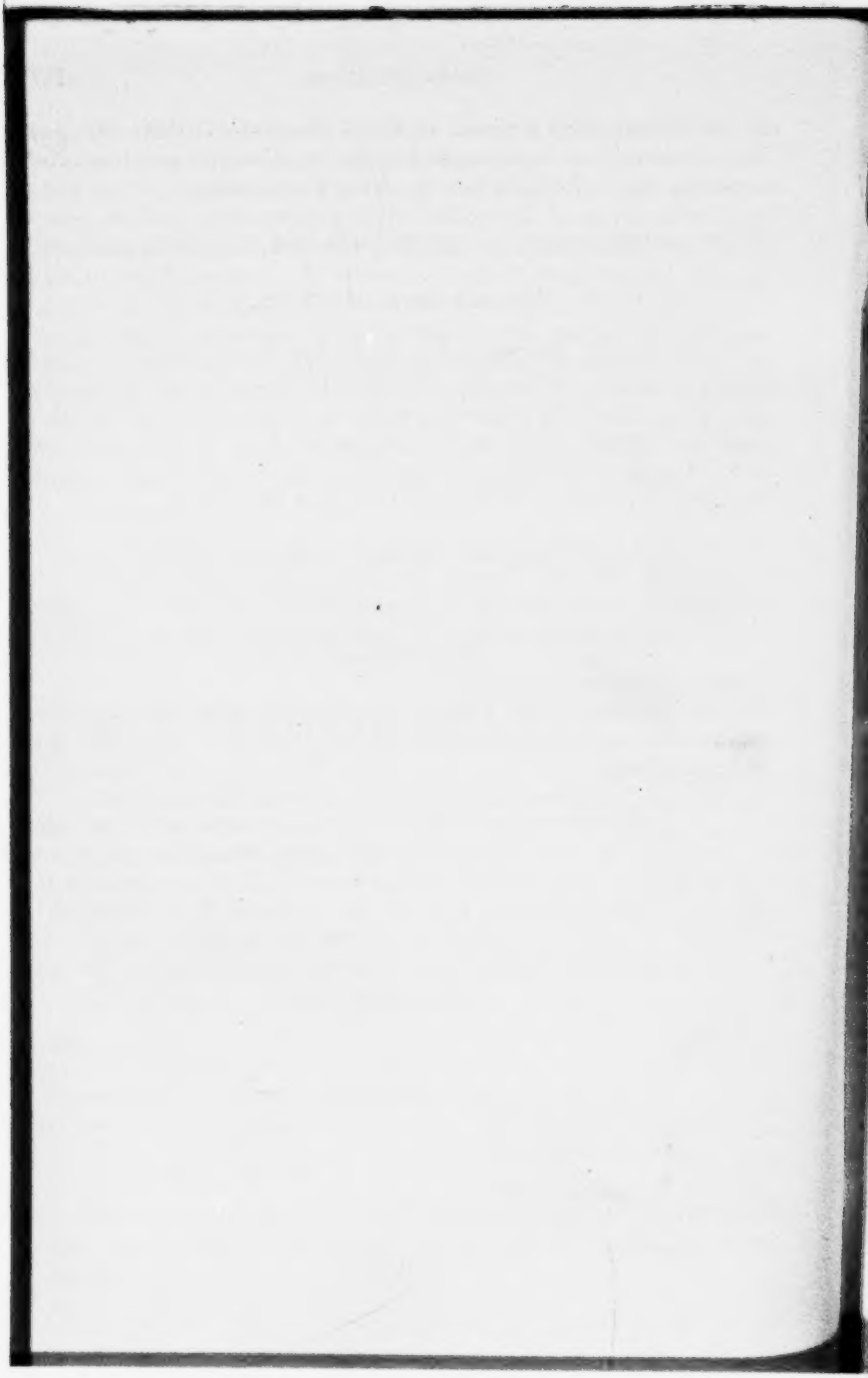
Mary Meinert

No. 945, October Term, 1902, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of March A. D. 1904.

(Seal)

Edward M. Holloway,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.



Supreme Court of the United States, October Term, 1903.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED, Plaintiff-in-error,
versus
MARY MEINERT, Defendant-in-error.

It is hereby stipulated by and between the parties hereto that the certified transcript of the record in the above entitled action, heretofore filed in the office of the clerk of the Supreme Court upon the petition for the writ of certiorari issued by the Supreme Court upon the 12th day of April, 1904, in the above entitled action, shall be taken and be deemed to be a sufficient return by the clerk of the circuit court of the United States in and for the seventh circuit to said writ of certiorari.

Dated New York, April 13, 1904.

GEO. W. WICKERSHAM,
Counsel for Plaintiff-in-error.
G. K. DENTON,
Counsel for Defendant-in-error.

Endorsed: Filed Apr. 19, 1904. Edward M. Holloway, clerk.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Being informed that there is now pending before you a suit in which The Nederland Life Insurance Company, Limited, is plaintiff in error, and Mary Meinert is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Indiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twelfth day of April, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 19,275 Supreme Court of the United States. No. 624, October term, 1903. The Nederland Life Insurance Co., Limited, *vs.* Mary Meinert. Writ of certiorari. Filed Apr. 19 1904 Edward M. Holloway, clerk.

UNITED STATES OF AMERICA, }
Seventh Circuit. }

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of The Nederland Life Insurance Company, Limited, plaintiff-in-error, *v.* Mary Meinert, defendant-in-error, is a full, true and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this nineteenth day of April, A. D. 1904.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] File No. 19,275. Supreme Court U. S., October term, 1904. Term No. 211. The Nederland Life Ins. Co., Limited, petitioner, *vs.* Mary Meinert. Writ of certiorari and return. Filed April 22d, 1904.

COPY.

Dyer 11.
Cole

Office Supreme Court U. S.
FILED
MAR 19 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED,
Plaintiff in Error,

vs.

MARY MEINERT,
Defendant in Error.

Petition for a Writ of Certiorari.

GEORGE W. WICKERSHAM,
Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM 1903.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED, Plaintiff in Error, vs. MARY MEINERT, Defendant in Error.	Notice.

SIRS: Please Take Notice that upon a certified copy of the transcript of the record herein, and upon the annexed petition of The Nederland Life Insurance Company, Limited, verified the 10th day of March, 1904, I shall move the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, the 4th day of April, 1904, at the opening of the Court on that day or as soon thereafter as counsel can be heard, for a writ of *certiorari* directed to the United States Circuit Court of Appeals in and for the Seventh Circuit, to bring before the Supreme Court the judgment and proceedings in a certain action at law wherein The Nederland Life Insurance Company, Limited, was plaintiff-in-error, and Mary Meinert, defendant-in-error, recently decided by said Circuit Court of Appeals, for such proceedings therein as to said Supreme Court may

seem just, and for such other and further relief in the premises as may be just.

Respectfully yours,

GEORGE W. WICKERSHAM,
Counsel for petitioner.
40 Wall Street
New York City

TO MESSRS. ALBERT J. BEVERIDGE,
L. A. WHITCOMB,
G. K. DENTON,
Counsel for Defendant in Error.

IN THE
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1903.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED, Plaintiff in Error, vs. MARY MEINERT, Defendant in Error.	Motion.

And now comes The Nederland Life Insurance Company, Limited, the plaintiff-in-error above named, by George W. Wickersham, its counsel, and moves this Court, upon a certified copy of the transcript of the record herein and upon the annexed petition, verified the 10th day of March, 1904, for a writ of *certiorari* directed to the United States Circuit Court of Appeals in and for the Seventh Circuit, to bring before this Honorable Court the judgment and proceedings in an action wherein The Nederland Life Insurance Company, Limited, was plaintiff-in-error, and Mary Meinert, defendant-in-error, recently decided by the said Circuit Court of Appeals, for such proceedings therein as to this Court may seem just, and for such other and further relief in the premises as may be just.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1903

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED,
Plaintiff in Error,

vs.

MARY MEINERT,
Defendant in Error.

Petition for writ of certiorari requiring The United States Circuit Court of Appeals in and for the Seventh Circuit, to certify to the Supreme Court, for its review and determination, the case above entitled.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of The Nederland Life Insurance Company, Limited, respectfully shows—

FIRST. This case presents one simple question, namely—whether the Court below correctly decided that a notice given by petitioner in exact conformity with the statute of New York was, nevertheless, insufficient upon which to base the forfeiture authorized by that statute, because the statutory requirement did not apprise the insured of certain additional rights which he had under his insurance contract.

This construction which petitioner believes to be entirely erroneous, has never been sustained by the Courts of New York, and is believed to be at variance with their decisions, which were misinterpreted by the Courts below. For this reason petitioner urges this Court to bring up the case for review.

SECOND: Mary Meinert, a citizen and resident of Indiana, brought this action at law, in the Superior Court of Vanderburgh County, in the State of Indiana, against your petitioner, a corporation duly organized under the Laws of the Kingdom of the Netherlands, and doing business through a branch office in the City of New York, in the State of New York.

Your petitioner duly removed the cause into the Circuit Court of the United States for the District of Indiana upon the ground that your petitioner, defendant therein was an alien and the said plaintiff a citizen of the State of Indiana.

The action was brought to recover the sum of Six Thousand Dollars ($6,000), on account of a policy of life insurance for $5000 issued by petitioner upon the life of William Meinert, payable upon his death to his wife Mary Meinert.

THIRD: The principal defence relied upon by petitioner was that the policy had been forfeited by the insured's failure to pay the premiums. The facts in this regard as found by the trial court are as follows:

The policy was issued March 5th, 1896, and William Meinert, the insured, paid the quarterly installments of premiums of $25.25 each, which fell due upon the fifth days of March, June, September and December, 1896, *and failed to pay any further premiums, although by the terms of the policy similar quarterly installments of premiums were due each year* (Rec. 32).

William Meinert died on March 24th, 1900, no premiums, except those mentioned, having ever been paid upon the policy (Rec. 33).

The policy contained the following clause which was made a part of the contract of insurance, viz:

> "In case of non-payment of any annual premium or installment thereof within thirty days after the same shall fall due, this policy shall be null and void, subject, however, to provisions as to cash surrender and paid-up policy values. The Company will, however, as a matter of favor and not of right, mail notice to the insured or the assignee at the last address furnished by him or them to the Company, to the effect that the policy may be re-established by the payment of the annual premium or installment thereof still due, within ten days after mailing notice" (Rec. 32).

In the application for the policy of insurance it was stipulated that the policy should be governed by the laws of the State of New York.

The petitioner, on February 15th, 1897, mailed to William Meinert, at his correct address, the following notice:

> "NEDERLAND LIFE INSURANCE CO. (LD.)
> "Established in Amsterdam (Holland), 1858.
> "United States Branch.
>
> "874 BROADWAY, NEW YORK CITY.
>
> "Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force. The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the Company, or to a person authorized to collect such premium holding the Company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid-up policy.
>
> "L. I. DUBOURCQ,
> "President U. S. Branch."

"If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.).

"ATTENTION.

"No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

"Please return this notice when you send remittance to the Branch Office, or to the person authorized to collect premiums.

"If this notice was not properly addressed, give changed address, No._____Street_____Name Post Office_____, County of_____State of _____Name_____"

This notice was received by William Meinert on February 16th, 1897, *more than fifteen and less than forty-five days before March 5th, 1897.* Neither Meinert nor anyone on his behalf ever paid the premium due on March 5th, 1897, nor any other premium due on the policy thereafter.

On April 3rd, 1897, the Nederland Life Insurance Company mailed another notice to William Meinert correctly addressed to him and which he received, which notice read as follows:

"NEDERLAND LIFE INSURANCE CO., LIMITED,
"Established 1858, Amsterdam, Holland.
"United States Branch,
"874 Broadway, New York.
"NEW YORK, APRIL 3rd, 1897.
"WILLIAM MEINERT,
"217 Law Ave., Evansville, Ind.
"DEAR SIR—The premium on your policy which fell due on the 5th March has not been paid and the policy is therefore null and void.

I beg to inform you, however, that if the same is paid within ten days your policy will be reinstated.

"Policy No. 58021.

"L. I. DuBourcq,
"President."

On April 22nd, 1897, the Nederland Life Insurance Company, Limited, entered on its records in its office a declaration that the policy was forfeited.

The trial court held that notwithstanding the above mentioned defaults the policy had been saved from forfeiture upon the ground that the notices given as aforesaid failed to comply with the provisions of Chapter 690 of the Laws of New York of 1892, and gave judgment for the plaintiff for $4985.05, with six per cent. interest thereon from June 30th, 1902.

Your petitioner thereupon prosecuted a writ of error upon this judgment to the Circuit Court of Appeals for the Seventh Circuit where the judgment was affirmed.

The reasons given by the Circuit Court of Appeals for its decision are set forth at considerable length in an opinion written by Judge Bunn (concurred in by Jenkins and Grosscup, Judges). After stating the facts, and deciding that the policy was to be governed by the laws of the State of New York because a provision to that effect had been inserted in the application for the policy, the Court said:

> "It only remains to inquire whether, under the laws of New York, the policy has been forfeited. It has not been forfeited unless it is by virtue of the express provision in the policy providing for forfeiture. Without a clause providing for a forfeiture the policy is not forfeited for nonpayment of the premium, any more than a land contract is forfeited by nonpayment of principal or interest when due. The rule is laid down in 19 Am. & Eng. Enc. of Law, 2 ed. 44, as follows: 'Since forfeitures are odious in 'the eyes of the law, a default in the payment

'of a premium on life insurance does not forfeit 'the policy where there is no stipulation to that 'effect in the policy.' This is the well settled rule. The reason why forfeitures are odious in the eyes of the law, and are said to be abhorred, is that they are not equitable. Nevertheless, if a policy of insurance provides in express terms for a forfeiture for nonpayment of the premium when due, the law will enforce it. But before the Court will declare a forfeiture, the conditions of the policy upon which the forfeiture is founded must be strictly complied with. And this brings us to the only remaining question in the case, whether the provisions of the policy in regard to notice of forfeiture have been complied with by the company. This provision is inserted for the benefit of the company. It is the company's language and it cannot complain if the Court, as it will, place a strict construction upon it, to save a forfeiture if possible. If the company has given the notice provided in the contract, then the forfeiture will hold, otherwise not. Phelan v. Northwestern Mutual, etc., 113 N. Y., 147; 20 N. E. 827; 10 American State Report, 441; Schad v. Security Mutual, etc., 42 N. Y. S. 314; 155 N. Y. 640; New York Life Insurance Company v. Dingley, 93 Fed. Rep. 153; Born v. Home Insurance Co. (Iowa) 81 N. W. 676; Smith v. Continental Insurance Company (Iowa) 79 N. W. 126; Providence Savings Life v. Nixon, 73 Fed. Rep. 144; Equitable Life v. Nixon, 81 Fed. Rep. 796; Hicks v. National Life Ins. Co., 60 Fed. Rep. 690.

"Under these authorities it seems clear that the notice given in this case was not a substantial compliance with the terms of the policy. Under those terms, the premium for nonpayment of which, it is claimed, the policy was forfeited, became due on the 5th day of March, 1897. The condition on the back of the policy provided that: 'In case of nonpayment of any premium 'within *thirty days* after the same shall become 'due, this policy shall be null and void.'

"The notice given to the insured by the company was as follows:

'Pursuant to chapter 690 of the Insurance

'Law of 1892, of the State of New York, you 'are hereby notified that the quarterly premium 'of $25.25 on policy No. 58021 will fall due on 'the 5th of March, 1897, if the policy be then in 'force.

'The conditions of your policy provide that 'unless such premium shall be paid at the 'United States Branch office of the Company, 'or to a person authorized to collect such 'premium, holding the company's receipt there- 'for, by or before that date, the policy and all 'payments thereon will be forfeited and void, 'except as to the right to a cash surrender value 'or paid up policy.

'L. I. DuBourcq,
'Pres. U. S. Branch.'

"This notice is evidently far from being a compliance with the contract, and is furthermore quite misleading. The insured is notified that his premium is due the 5th day of March, and unless he pays it '*by or before that day*' his policy will be forfeited and void. Whereas, by the terms of the policy he has thirty days after March 5th in which to pay it. The case of Phelan v. Northwestern Mutual, 113 N. Y. 147 is quite decisive of this question. The defect in the notice given in the case at bar is much more serious than the one given in that case. The case of Schad v. Security Mutual, 42 N. Y. 314, affirmed in 155 N. Y. 640, is equally in point and decisive of the law in New York. See also Life Ins. Co. v. Dingley, 93 Fed. 153, decided by the U. S. Circuit Court of Appeals for the Ninth Circuit, which was also a case under the New York Statute."

The New York statute upon the subject of forfeiture was Section 92 of the Insurance Law of New York, which is Section 92 of Chapter 690 of Laws of 1892 of New York. This provides as follows—

"92. *No forfeiture of policy without notice.* No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any

policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given."

It is submitted that the Circuit Court of Appeals erred in deciding that the Meinert policy had not been forfeited by reason of the non-payment of the premium due March 5th, 1897, and that the error into which the Court fell was due to the fact that it entirely overlooked the fact that *two* notices were sent by the Company to Meinert, *one* in compliance with the statute, the *other* in compliance with the policy, and that the Court entirely misapprehended and misconstrued the New York statute and the decisions under it.

As stated in the opinion, it is true that unless the policy contain a provision that the policy should be forfeited if the premiums were not paid, it could not be forfeited; but the Meinert policy *did* contain such a clause, which provided that:

> "In case of non-payment of any annual premium or installment thereof within thirty days after the same shall fall due, this policy shall be null and void" (Rec. 32).

The forfeiture clause also provided that "* * * as a matter of favor, and not of right," the Insurance Company would mail a notice to the insured that the policy might be reestablished by payment of the premium within ten days after mailing the notice. Such a notice as this *was* mailed to the insured on April 3rd, 1897, and the trial court finds this fact and also the fact that Meinert received this notice (Rec. 34).

Everything, therefore, was done by the Insurance Company which the *policy* required as a condition to the forfeiture of the policy.

The only remaining question, therefore, was whether a notice was also sent to the insured which complied with Section 92 of the Insurance Law of New York above quoted.

For convenience of reference and comparison we print the several requirements of the statute below, and in italics under each of the requirements a state-

ment of what the notice sent in the effort to comply with the statute did actually contain.

The notice is required by the statute to state :

(a) The amount of the premium * * * due on such policy. *(Notice sent states $25.25 due March 5, 1897).*

(b) The place where it should be paid.

(Notice sent states U. S. Branch Office, 874 Broadway, New York, or to a person authorized to collect such premium and holding company's receipt therefor.)

(c) The person to whom the same is payable.

(Notice states : To a person authorized to collect such premium holding company's receipt therefor. At the foot of the notice it is further stated "*If payment be "made to the Company direct it can be done by valid "draft, check, postal or express money order made "out to the order of the United States Branch of "the Nederland Life Insurance Co. (Ld).*" (p. 33)

(d) That unless such premium * * * then due shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid up policy as in this chapter provided.

(Notice sent states "*that unless such premium*", *i. e.* that due, as previously stated, on the 5th March, 1897 "*shall be paid at the United States Branch Office of the Company*" stated in the heading of the notice to be at 874 Broadway, New York City—"*or to a person authorized to collect such premium holding the company's receipt therefore, by or before that date,*" *i. e.* the 5th of March, 1897, previously stated in the notice to be the day when the premium fell due, "*the policy and all payments thereon will become forfeited and void, except as to the right to a cash surrender value or paid up policy*" (Record p. 33) This notice is a literal compliance with the terms of the statute, except that the words "*as in this chapter provided*" are omitted after the words "*paid up policy.*"

The Notice must be
duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his last known post office address, postage prepaid.

(This was done. Findings 7 and 8. Record pp. 33–34)

The Notice must be sent by

The corporation or by an officer thereof, or a person appointed by it to collect such premium.

(This was done. Findings 7 and 8.)

The notice must be mailed

At least *fifteen*, and not more than *forty-five* days prior to the day when the same is payable.

(This was done. Findings 7, 8, *supra.*)

The Circuit Court of Appeals was of opinion that this notice was not a substantial compliance with the contract embodied *in the policy* in that it did not inform the insured that, as a matter of fact, as provided by his policy, he had thirty days *after* March 5th, 1897, in which to pay his premium to prevent a forfeiture of his policy and that it was in that respect misleading, and therefore, *although it strictly conformed with the statute*, it was defective, for the reason, apparently, that in stating exactly what the statute required it necessarily omitted all reference to the thirty days' clause in the policy.

In other words, the Court confused the requirements of the statute with those of the policy. Under the *statute* there could be no forfeiture for non-payment of a premium, unless a notice in statutory form were sent at least *15* days *before* the premium fell due. This being done, so far as the *statute* was concerned, the company was free to forfeit the policy on non-payment of the premium and at the expiration of thirty days from the mailing of the notice.

But petitioner had voluntarily imposed a further restriction upon this right of forfeiture, by a *contract*, embodied in the policy, providing in effect that this

right of forfeiture should not be exercised until thirty days *after the premium fell due* (Record, p. 32), and that the Company would, as a matter of favor and not of right, mail notice to the insured "to the effect that "the policy might be re-established by the payment "of the annual premium or installments thereof still "due, within ten days after mailing said notice" (Record, p. 44).

Such a notice was duly mailed to the insured April 3, 1897, and received by the insured on April 5th.

(Finding 8, p. 34).

No tender of payment was made either within thirty days after the premium fell due, or within ten days after the notice was mailed; nor, as a matter of fact, during the remaining three years of Meinert's life. So that, both under the terms of the statute and under the terms of the contract the policy was clearly forfeited.

But the Circuit Court of Appeals was further of opinion that the question had been concluded against petitioner by the construction given to the New York Statute above cited, by the Court of Appeals of that State in *Phelan v. North Western Mutual*, 113 N. Y., 147.

In that case, the Court of Appeals held, first, that there was no evidence that a notice claimed to have been sent to forfeit a policy had in fact been mailed or delivered within the statutory period; and secondly, that said notice was in form defective under this statute, *because it failed to state that the policy would be null and void if the premium was not paid when due*, and stated instead that members neglecting to pay premiums when due were "*carrying their own risk*," which the Court of Appeals held might be misunderstood by ignorant policy-holders and did not necessarily apprise them that if they failed to pay premiums their policies would be forfeited. It further appeared in that case that the premium fell due December 31, 1882, and was not paid; but that it was tendered to the Company *on*

January 15, 1883, and refused. That the insured died later in that day.

The other New York case cited in the opinion as "equally in point and decisive of the law in New York" is *Schad vs. Security Mutual*, 155 N. Y., 640. In this case the Court of Appeals rendered no opinion, but the opinion of the Appellate Division of the Supreme Court reported in 11 App. Div., 487 states that the question before them for determination was

> "whether a notice which states that '*if your*
> "'*payment should not be made when due, your*
> "'*policy would cease to be in force*', complies
> "with a statute which requires that the notice
> "shall state that if the premium is not paid
> "when due, the said policy 'and all payments
> "'thereon will become forfeited and void.'"
> (p. 489).

This question they answered in the negative; citing in support of that decision the cases of *Phelan v. Northwestern Mutual L. Ins. Co., supra*, and *Merriman v. Keystone Mut. Ben Ass'n* (18 N. Y. Supp., 305.)

It is submitted that these two cases were not only not decisive of the questions involved in the case at bar, but were not even pertinent. Furthermore, the opinion of the Circuit Court of Appeals, while it holds the notice to Meinert defective and misleading because it failed to apprise him of the fact that under the provisions of his policy he had thirty days after March 5th, 1897, within which to pay his premium and reinstate his policy, fails completely to take into account the second notice to him, which the trial court found that he had received, which informed him of the right conferred upon him in the *policy* to thus reinstate his policy.

It is thus apparent that even if Meinert was at all misled by the first notice received by him, all chance of his actually being harmed by such information was

removed by the second notice, which was received by him in ample time for him to reinstate his policy; as the finding of the trial court shows.

It is submitted that the Circuit Court of Appeals for the Seventh Circuit erred in their construction of Section 92 of the Insurance Law of New York, and did so *because of an apparent misapprehension of the construction of this statute by the courts of New York.* It has been pointed ont that the construction put upon this section of the New York Insurance Law is not supported by the two New York cases cited by the Circuit, Circuit Court of Appeals, and an examination of the statute itself and a comparison of it with the notice sent Meinert shows that every single requirement of the statute was contained in the notice.

The Circuit Court of Appeals further relied upon a decision of the United States Circuit Court of Appeals for the Ninth Circuit, in the case *New York Life Ins. Co. v. Dingley*, 93 Fed. Rep., 153. This was a most extraordinary decision. It appeared and was found by the court that the notice given exactly complied with the terms of the statute. The premium became due July 19, 1896. The notice which was sent June 27, 1896, not less than fifteen nor more than forty-five days prior to the date when the payment fell due, stated in the language of the statute, that unless the premium to come due July 19 "shall be paid to "the company or to a duly appointed agent or person "authorized to collect such premium by or before the "day it falls due, such policy and all payments thereon "will become forfeited and void." But because the statute itself provided that

> "No such policy shall in any case be forfeited "or declared forfeited or lapsed until the expira- "ation of thirty days after the mailing of such "notice,"

and because the policy allowed a month's grace, in which to pay the premium, the Circuit Court of Ap-

peals held that this notice did not comply with the *intention* of the statute and therefore that the policy could not be forfeited. In other words, the Court held that by following the requirements of the statute literally, the insurance company had forfeited the right to avail of its provisions, which alone restricted it in exercising the right of forfeiture.

The court in that case based this amazing decision upon its interpretation of the decision by the Court of Appeals of the State of New York in *McDougal v. Society*, 135 N. Y., 551, where a notice which did not literally comply with the statute, *was nevertheless held sufficient to sustain a forfeiture of the policy for failure to pay the premium* either at the time when it fell due, or within the period of grace permitted by statute and policy. The policy before the Court of Appeals in the McDougal case was not an ordinary life insurance policy. It was a beneficial society policy made originally for the term of one year, the company promising

> " to renew and extend this insurance during each
> " successive year from the date thereof upon
> " condition that the assured shall pay on or
> " before the 23rd day of July in each successive
> " year during the continuance of the contract
> " the mortuary premium—and also an expense
> " charge of Three Dollars on each $1,000 in-
> " sured therein. The payment of said annual
> " mortuary premium and the annual expense
> " charge being the consideration for the con-
> " tinuance of the insurance in each successive
> " year, etc."

The notice which was seasonably mailed to the insured under that policy advised him that

> " in order to continue and extend the insurance
> " it will be necessary that the payments re-
> " quired for that purpose shall be paid on or
> " before the date above mentioned as stipulated
> " in the policy contract."

The court held that in view of the character of the policy, the notice to be given could not closely conform with the statute, inasmuch as the yearly method of insurance was of a special character.

GRAY, J., at page 556:

> "It could not state that if the 'premium' "was not paid, the policy and all payments "thereon would become forfeited and void; for "that would not be accurate. Something more "than a premium was to be paid to extend the "contract of insurance and, therefore, the com- "pany notified him that certain 'payments' "were necessary for that purpose."

The court then continued as follows,—

> "The obligation of the statute must not be "unreasonably insisted upon. It provides for "the giving of a notice which shall be unambig- "uous and intelligible to all. When applied to "an insurance contract out of the ordinary "form it secures to the assured such a notice as "will contain statements reminding him of when "and where he is to make any payments pursu- "ant to the terms of the contract, their amount "and the effect of nonpayment. The statute "was not made to operate harshly upon the in- "surer but to afford a protection to the assured "by the reasonable requirement of a notice "couched in plain terms from the insurer before "the interest of the assured could be forfeited."

An application was made to this Court by the plaintiff in error, the New York Life Insurance Company, in the Dingley case, for a writ of *certiorari*, but the writ was denied (See 176 U. S., Reps., p. 682, case No. 325).

Upon examining the record in that case we find that before making the application for the writ, the life insurance company had *voluntarily* paid the judgment awarded against it below, although no execution had been issued, and that that fact was urged by the de-

fendant in error as one reason for not granting the writ.

It is respectfully submitted that the Circuit Court of Appeals in the Ninth Circuit in deciding the Dingley case, and the Circuit Court of Appeals in the Seventh Circuit, in deciding the case at bar, have totally misconceived the requirements of the New York. statute, and have rendered decisions which are not supported by the decisions of the New York Court of Appeals referred to and relied upon them in their decisions, and have put upon the plain language of the statute of New York a construction not warranted by it, and which is at variance with the generally accepted views of the profession in the State of New York and for this reason the intervention of this court is urged. It will be observed that the notice sent to Meinert, pursuant to the statute in this case, apprised him that if the premium were not paid when due " the policy and all payments thereon will become forfeited and void," etc. It did not state *when* that forfeiture would take place. The statute, of which he is judicially presumed to have had knowledge, declared that this forfeiture should not take place until the expiration of thirty days after the mailing of this notice. As above shown, this time was further enlarged by the provision of the policy and the further notice in writing given to Meinert clearly pointed out to him that he had this additional time within which to make his payment and prevent forfeiture, but he did not avail or seek to avail of either of these privileges.

In *Shad v. Security Mutual Life Ins. Co.*, above cited, (11 App. Div., 487), the defendant who sought to justify a departure from the statutory form of notice, cited and relied upon the McDougal case above referred to. But the court said, at page 491:

> " There the notice was held to be good be-
> " cause the contract of insurance was out of the
> " ordinary form and the obligation of the stat-

" ute was construed in that view. It was said
" that in the ordinary cases of insurance con-
" tracts the words of the statute are readily
" capable of being used. *Inferentially it may*
" *be said that the view of the court was that*
" *they should be used in ordinary cases.* In
" the present case there was nothing in the way
" of using the language of the statute, and the
" McDougal case is not, I think, authority to
" support the notice."

The facts of that case so far as the provisions with respect to redemption under the statute are concerned, do not differ from those of the case at bar; and that case is in effect a distinct *authority* that the statutory form of notice was requisite in this case, and that being adhered to, it was sufficient upon which to base a forfeiture.

FOURTH: The petitioner believes and avers that the question involved in this case is of such gravity and importance,—involving, as it does, the construction of a statute of the State of New York applicable to all policies of life insuranc issued within its territory by the numerous life insurance companies engaged in business in New York,—that it justifies the exercise of the jurisdiction vested in this Court to issue a writ of *certiorari* requiring the cause to be brought here for review.

FIFTH: Your petitioner presents herewith a certified copy of the entire record of the said case in the said Circuit Court of Appeals as part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals, and the same is marked " Exhibit A."

SIXTH: Your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous and that this Honorable Court should require the said case to

be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress entitled "An Act to es- "tablish Circuit Courts of Appeals, and to define and "regulate in certain cases the jurisdiction of the courts "of the United States, and for other purposes," approved March 3rd, 1891, the said case being made final in said Circuit Court of Appeals by the said act.

WHEREFORE your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals in and for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a certain day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "The Nederland Life Insurance "Company, Limited, Plaintiff in Error, v. Mary "Meinert, Defendant in Error," "No. 945," to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of "Appeals, and to define and regulate in certain cases "the jurisdiction of the courts of the United States, "and for other purposes," approved March 3rd, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act; and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE NEDERLAND LIFE INSURANCE COMPANY,
LIMITED,
by L. I. DUBOURCQ,
President.

STATE OF NEW YORK, }
County of New York. } ss.:

L. I. DUBOURCQ, being duly sworn, says: I am the President of the United States Branch of The Nederland Life Insurance Company, Limited, the petitioner named in the foregoing petition. I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief; my knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the Court in which this action has been heard and from my personal knowledge of the facts in the case acquired by me as President of the petitioner. The reason why this verification is made by me and not by the petitioner is that the petitioner is a foreign corporation, and I am an officer thereof—to-wit, its President.

L. I. DUBOURCQ.

Sworn to before me this 10th }
day of March, 1904 }

A. W. ANDREWS,
Notary Public,
County of New York.

I certify that I have examined the foregoing petition, and in my opinion the petition is well-founded; and that the case is one in which the prayer of the petitioner should be granted by the Court.

GEORGE W. WICKERSHAM,
Of counsel for the petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED,
Petitioner,
Plaintiff in Error,

AGAINST

MARY MEINERT,
Defendant in Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. IN ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

BRIEF OF THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED, PETITIONER AND PLAINTIFF IN ERROR.

Statement.

Mary Meinert, a citizen and resident of Indiana, brought this action at law in the Superior Court of Vanderburgh County, in the State of Indiana, against the petitioner the Nederland Life Insurance Company, Limited, a corporation organized under the laws of the

Kingdom of Netherlands and doing business in the State of New York.

The action was brought to recover the sum of six thousand dollars ($6,000) upon a policy of life insurance for five thousand dollars ($5,000) issued by the petitioner upon the life of William Meinert payable to Mary Meinert (Amended Complaint, Rec., p. 2).

The petitioner removed the cause into the Circuit Court of the United States for the District of Indiana upon the ground that the petitioner, defendant therein, was an alien, and Mary Meinert a citizen of Indiana.

The Circuit Court rendered a judgment against the petitioner for the sum of four thousand nine hundred and eighty-five and $\frac{5}{100}$ dollars ($4,985.05) with interest (Rec., p. 38).

The petitioner then prosecuted a writ of error upon the judgment to the Circuit Court of Appeals for the Seventh Circuit, which affirmed the judgment of the Circuit Court (Rec., p. 117).

To review this decision, the petitioner filed a petition for a writ of *certiorari* in this Court upon March 19th, 1904.

Writ of *certiorari* was thereafter granted by this Court, and the cause now comes before this Court for a hearing upon the merits on this writ and the return filed April 22d, 104.

The insured, William Meinert, was a resident of Indiana, and the policy was delivered in Indiana and the first premium thereon paid in that State (See Policy, Rec., p. 4, Sixth Finding of Fact, p. 33 and averments stipulated into second and third paragraphs of answer to amended complaint, Rec., pp. 15, 16).

The policy insured Meinert's life in favor of his wife, Mary Meinert, for five thousand dollars ($5,000), the consideration to be paid by Meinert being—

> " the payment of the quarterly premiums of twen-
> " ty-five dollars and twenty-five cents, to be made
> " at its branch office in the City of New York on
> " or before the fifth day of March–June–Septem-
> " ber–and–December " (See Policy, Rec., p. 4).

Meinert's policy was dated March 5th, 1896. Four quarterly installments of these premiums of twenty-five dollars and twenty-five cents ($25.25) each upon March, June, September and December 5th, 1896, were paid, and no other premiums were ever paid (Second Finding, Rec., p. 32). Meinert died March 24th, 1900.

Article II. on the back of the policy, which by an express provision contained in the body of the policy was made a part of the contract of insurance, provides as follows :

> " In case of non-payment of any annual premium " or installment thereof, within thirty days after " the same shall fall due, this policy shall be null " and void, subject, however, to the provisions as to " cash surrender and paid-up policy values. The " Company will, however, as a matter of favor and " not of right, mail notice to the insured or as- " signee, at the last address furnished by him or " them to the Company, to the effect that the " policy may be re-established by the payment of " the annual premium or installments thereof still " due, within ten days after mailing said notice " (Policy, Rec., p. 6 ; Findings, p. 32).

The application for the policy provided as follows :

> " I do hereby declare that each and every of " the statements made by me in the foregoing " application are true and correct, whether written " in my own hand or not, and I hereby agree that " this declaration, together with the said state- " ments and those made by me on the Medical " Examiner's Certificate, shall be the basis of the " policy of insurance to be drawn up under the " provisions and requirements in force with the " the Company at the date of my signing this ap- " plication, which provisions and requirements " will be printed and written on the policy ap- " plied for, and which provisions and require- " ments are hereby accepted as binding upon " me in like manner as if the same were set forth " in full in this application ; and that if any " untrue averment is contained in this declar- " ation, or in the said statement or certificate,

" or if it shall hereafter appear that any material " information has been withheld, then the said " policy shall be null and void, and all moneys " which shall have been paid on account of the " insurance shall be absolutely forfeited to the " Company. I further agree that any policy " which may be issued under this application " shall not be in force until the actual payment " and acceptance of the premium by said Com- " pany, or its duly authorized agent, during my " lifetime and good health, and that the contract " of insurance contained in the policy and in " this application shall be governed by the laws " of the State of New York, the place of said con- " tract to be the principal office in the United " States of said Company in the City of New " York.

" Dated at Evansville, Ind., this 29 day of Feb- " ruary, 1896.

" Witness : " Signed WILLIAM MEINERT "

" Signed H. LOWENTHAL & Co.

General Agents.

(Rec., p. 9, Exhibit B.)

On February 15, 1897, the defendant mailed at Chicago, Illinois, the following notice, enclosed in an envelope and duly stamped and properly addressed to William Meinert, 217 Law avenue, Evansville, Indiana :

" NEDERLAND LIFE INSURANCE CO. (LD.)

" Established in Amsterdam (Holland), 1858.

" United States Branch :

" 874 Broadway, New York City.

" Pursuant to Chapter 690 of the Insurance Law of 1892 of the State of New York, you are hereby notified that the quarterly premium of $25.25 on Policy No. 58021 will fall due on the 5th day of March, 1897, if the policy be then in force.

" The conditions of your policy provide that unless such premium shall be paid at the United States Branch Office of the Company or to a person authorized to collect such premium holding

the Company's receipt therefor, by or before that date, the policy and all payments thereon will be forfeited and void, except as to the right to a cash surrender value or paid up policy.

L. I. DuBourcq,
President U. S. Branch.

" If payment is made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co. (Ld.).

" Attention.

" No payment of premium made to any person except in exchange for the official receipt signed by two executive officers of the United States Branch of the Company, can be recognized.

" Please return this notice when you send remittance to the Branch Office or to the person authorized to collect premiums.

" If this notice was not properly addressed, give changed address.

" No.----------Street----------Name
Post office----------County of----------
State of----------Name." ----------

This notice was received by William Meinert on February 16th, 1897—more than fifteen and less than forty-five days prior to March 5th, 1897, the day upon which the premium fell due—and neither Meinert nor any one on his behalf ever paid said premium on March 5th, 1897, or at any time thereafter (Rec., pp. 33, 34, Seventh Finding of Fact).

On April 3d, 1897, the petitioner also sent, by mail from Chicago, Illinois, to William Meinert a second notice, as follows:

" NEDERLAND LIFE INSURANCE CO. (LIMITED).

" Established 1858, Amsterdam, Holland.

" United States Branch, 874 Broadway, New York.

" NEW YORK, April 3rd, 1897.

" WILLIAM MEINERT,
" 217 Law Ave., Evansville, Ind.

" DEAR SIR:—The premium on your policy which fell due on the 5th March has not been paid and the policy is therefore null and void. I beg to inform you, however, that if the same is paid within ten days your policy will be reinstated.

" L. I. DUBOURCQ,
" President.

" Policy No. 58021."

Meinert received this second notice on April 5th, 1897, but never acknowledged its receipt and never took any steps to have the policy reinstated (Rec., p. 34, Eighth Finding of Fact).

On April 22d, 1897, the petitioner entered upon its records a declaration that the policy was forfeited and lapsed for failure to pay the premium (Rec., p. 34, Ninth Finding of Fact).

William Meinert died upon March 24th, 1900 (Rec., p. 33.)

A jury was waived (Rec., p. 31), and the trial Judge found (Rec., p. 35) that the policy was in full effect at Meinert's death; that it had not been forfeited nor lapsed within the provisions of Chapter 690 of the Insurance laws of New York of 1892, and that the plaintiff was entitled to recover.

The Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the trial Court, held that the policy was governed by the laws of the State of New York by reason of the stipulation contained in the application for the policy.

> " that the contract of insurance contained in the policy and in this application shall be governed by the laws of the State of New York, the place

of said contract to be the principal office in the United States of said Company in the City of New York,"

and that this stipulation incorporated in the policy, Section 92 of Chapter 690 of the Laws of 1892 of New York, which is as follows:

"92. *No forfeiture of policy without notice.*

"No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or

lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given."

The Circuit Court of Appeals, in their opinion, reported in 127 Federal Reporter, at page 651, further held that the notice sent to and received by Meinert was not a sufficient notice under this statute, because it stated that the conditions of his policy provided that if Meinert did not pay his premium due on March 5th, 1897, by or before that date the policy and all payments thereon would be forfeited, while by the terms of the policy he had thirty days after March 5th in which to pay the premium.

The Circuit Court of Appeals, therefore, held that the "notice given in this case was not a substantial "compliance with the terms of the policy" (Opinion, Rec., p. 115); and, further, that the notice was misleading. The Circuit Court of Appeals, therefore, affirmed the conclusions of the trial Court that the "policy sued on is now and was at the beginning of "this action in full force and effect; that said policy "has not been forfeited, nor has it lapsed under and "pursuant to the provisions of Chapter 690 of the "Insurance Law of 1892 of the State of New York" (Opinion, Rec., p. 113).

In the petition for the writ of *certiorari* the only ground urged by the petitioner for a review of this judgment was that the Circuit Court of Appeals and the trial Court had erroneously construed the New York statute, and it contended that the notice sent to Meinert was in exact conformity with the statute, and that the construction placed upon the statute by the Circuit Court of Appeals and the trial Court was not sustained by the New York State courts and at variance with their decisions.

This contention is still made by the petitioner, but in addition thereto it maintains that this policy of insurance, having been delivered in the State of Indiana, to a resident and citizen thereof, and the only premiums of insurance that were paid having been paid in Indiana, is not subject to the laws of the State of New York, except in so far as the parties to the contract have provided that such laws should govern, and that the parties to this contract did not incorporate in the terms of this policy of insurance the provisions of Section 92 of Chapter 690 of the Laws of 1892, quoted at length above, and that this is apparent both from the terms of the policy as to forfeiture and notice and from the fact that this provision of the New York Insurance Laws was not intended to have any extra territorial force, but is confined in its application to policies issued in the State of New York to residents of the State of New York. Although this argument as to the application of the New York statute to the Meinert policy was not advanced in the petition for a writ of *certiorari*, nevertheless it was urged before the Circuit Court of Appeals and in the trial Court, and is raised by proper exceptions and assignments of error on the record, and it is submitted that now when the whole record is before this Court for a review upon the merits, the petitioner is not confined to the arguments set forth in the petition for the writ of *certiorari*, but may advance additional grounds for reversal of the judgment of the Circuit Court of Appeals.

The petitioner also maintains that Meinert's action in failing to pay any premium after December 5th, 1896, amounts to an abandonment of the policy. This also was not set forth in the petition for a writ of *certiorari* but was pleaded as a defense in the seventh paragraph of the answer to the amended complaint (Rec., pp. 30, 31).

Errors Assigned.

The following are the errors assigned by the petitioner, plaintiff-in-error, and upon which it relies for reversal :

1. That the Court erred in sustaining the demurrer to the second paragraph of the answer (Rec., p. 91).

The second paragraph of the answer admitted the issuing of the policy, but alleged that it was delivered and the first premium paid thereon in the State of Indiana, and that the policy provided that in the case of non-payment of any premium or installment thereof within thirty days after it was due the policy shall be null and void. It further alleged that a premium fell due on March 5th, 1897, and that the plaintiff failed to pay it, and that it was never paid, and that by reason thereof the policy became null and void (paragraph 2 of answer, Rec., p. 12, as amended by stipulation, Rec., pp. 15, 16 ; demurrer, Rec. p. 15 ; ruling sustaining demurrer to paragraph 2 of answer and exception, Rec., p. 23).

2. That the Court erred in sustaining the demurrer to the third paragraph of answer (Rec., p. 91).

The third paragraph of the answer contained similar allegations to those set forth in the second paragraph of the answer, and also alleged the sending of the first notice to Meinert setting the notice forth in full (answer, paragraph 3, Rec., p. 13, as amended by stipulation, Rec., pp. 15, 16 ; demurrer, Rec., p. 15 ; ruling sustaining demurrer to paragraph 3 of answer and exception, Rec., p. 23).

3. That the Court erred in its first conclusion of law on the facts as found by the Court, and in holding that the policy sued on at the beginning of the action was in full force and effect (Rec., p. 91 ; conclusion, Rec., p. 35).

4. That the said Court erred in its second conclusion of law on the facts as found by the Court, and in holding that the policy sued on in this action had not

been forfeited or lapsed under and pursuant to the provisions of Chapter 690 of the Insurance Law of 1892 of the State of New York, and in not holding that said policy had been forfeited and had lapsed because no premium or installment of premium had been paid thereon, as found by the Court, subsequent to the 5th day of December, 1896, and because, as found by the Court, the defendant, on February 15th, 1897, mailed to William Meinert, the insured, a notice substantially conforming to said Chapter 690, being the notice copied in the Seventh Finding of the Court (Rec., p. 92; Finding, pp. 33-34).

5. That the Court erred in rendering judgment against the defendant in said cause, the plaintiff in error, upon the findings of fact and conclusions of law of the Court, and said judgment is contrary to law and the facts as found by the Court (Rec., p. 92).

These assignments of error raise the following questions:

(1) Was the notice sent to Meinert that his policy would be forfeited if he did not pay the premium due March 5th, 1897, a sufficient compliance with the requirements of the New York statute, assuming that this statute is to be regarded as applicable to his policy?

(2) Were the requirements of the New York statute applicable to this policy?

(3) Did Meinert's failure to pay any premium after December 5th, 1896, amount to an abandonment of the policy?

If the notice sent Meinert did conform to the New York statute, or if the statute as to notice was not applicable to this policy, in either event the decision of the Courts below was erroneous and must be reversed.

The same result would follow if this Court should determine that the facts found establish the conclusion that Meinert abandoned his policy.

BRIEF OF ARGUMENT.

POINT I.

The premium notice sent to Meinert by the petitioner was in conformity to the New York Statute.

The statute is printed in full at page 7 of this brief.

The notice which the trial Court found was sent to and received by Meinert is printed in full at page 5 of this brief.

For convenience in comparison, we print the several requirements of the statute as to the contents of the notice, and in italics under such requirements the contents of the notice in compliance with that requirement. The statute requires the notice to state:

(*a*) "the amount of the premium." * * *

(Notice sent states $25.25 *due March 5th, 1897.*"

(*b*) "the place where it should be paid, and the person to whom the same is payable."

(Notice sent states "*premium shall be paid at the United States Branch Office of the Company, or to a person authorized to collect such premium holding the Company's receipt therefor.*"

The address of the United States Branch Office was previously stated in the heading to the notice to be "*874 Broadway, New York City.*" At the foot of the notice there is also the statement:

"*If payment be made to the Company direct it can be done by valid draft, check, postal or express money order made out to the order of the United States Branch of the Nederland Life Insurance Co.* (Ld.)."

There was also a stamp upon the notice, "*this premium is payable to H. Lowenthal and Company, Evansville, Indiana*" (Rec., p. 80).

(*c*) "duly addressed and mailed to the person whose life is insured * * * at his * * * post office address, postage paid * * * at least fifteen and not more than forty-five days prior to the day when the same" (*i. e.*, the premium) "is payable."

The notice sent, as established by the Seventh Finding of fact (Rec., p. 33) was "*On February 15th, 1897,* "** * * mailed inclosed in an envelope and duly* "*stamped and properly addressed to William Meinert,* "*217 Law Avenue, Evansville, Indiana.*"

(*d*) "The notice shall also state that unless such premium * * * then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to surrender value or paid-up policy as in this chapter provided."

Notice sent states: "*The conditions of your policy* "*provide that unless such premium*" (*i. e.*, the premium of $25.25 previously stated in said notice to be due March 5th, 1897) "*shall be paid at the United States* "*Branch Office of the Company,*" the address of which —874 Broadway, New York City—was stated at the top of the notice, "*or to a person authorized to collect* "*such premium holding the Company's receipt therefor* "*by or before that date*" (*i. e.*, the 5th of March, 1897, previously stated in the notice to be the due date of the premium), "*the policy and all payments thereon will* "*be forfeited and void, except as to the right to a cash* "*surrender value or paid-up policy.*"

This comparison shows that the notice sent Meinert was a literal compliance with the statute and almost in its very words. In one particular only did it vary from the statute in adding to its language the following italicized words, "*the conditions of your policy provide* that unless such premium shall be paid " the policy will be forfeited." The trial Court laid some stress upon this difference, but the Circuit Court of Appeals

totally disregarded it, and held the notice defective for other reasons.

We can hardly regard as serious the objection to the notice that it did not use the exact language of the statute, "unless such premium shall be paid," but stated instead "*the conditions of your policy provide* "that unless such premium shall be paid" the policy will become forfeited. The addition of the words "the conditions of your policy provide" to the statutory language did not make the warning to the insured of the impending forfeiture any less pointed, nor did it put him any less on his guard as to the effect of a default in payment of his premiums.

The object of the statute in providing for a warning notice to the insured of the accrual of his premium and the result of default in payment is as fully attained by the notice sent in the case at bar as if it had omitted the words "the conditions of your policy provide." Any such objection to the notice is captious and wholly unsupported by any authority.

The Circuit Court of Appeals based its objection to the notice solely upon the ground that it stated that unless the premium was paid upon March 5th, 1897, the policy would be forfeited, whereas, as a matter of fact, Article II. of the provisions and requirements provided that the insured should have thirty days after that date in which to pay it and prevent forfeiture.

The Circuit Court of Appeals held that this discrepancy between the notice and the policy rendered it fatally defective, and, after citing a number of cases (discussed at length later), said "Under these authori-"ties it seems clear that the notice given in this case "was not a substantial compliance with the terms of "the policy" (Rec., p. 115).

"This notice is evidently far from being a compli-"ance with the contract, and is furthermore quite mis-"leading" (Rec., p. 116).

It is apparent that this objection does not arise from the *terms* of the statute. These contain nothing which requires the notice to state any of the pro-

visions of the policy as to forfeiture. On the contrary, the statute provides explicitly that the notice "shall state that unless such premium * * * then "due shall be paid * * * by or before the day it "falls due the policy shall become forfeited." This is precisely what the notice did state, and because it stated exactly what the statute said it should the Circuit Court of Appeals held that it was defective and not in compliance with the contract.

In other words, that Court held that this policy was not forfeited by the default in payment of the premium, because the New York statute forbade forfeiture, without a certain form of notice, and further held that the notice given was insufficient, because, although in the very language of the statute, it did not contain certain additional information as to the provisions of the policy, not required by the terms of the statute.

This ruling engrafts upon the statute further requirements for the notice than are actually set forth in the statute, and this construction the Court seeks to justify by reference to the contract of insurance and to a number of cases.

An examination of these cases shows that they do not support the Circuit Court of Appeals' construction of the New York statute.

In *Phelan v. North Western Mutual*, 113 N. Y., 147, the Court of Appeals held, first, that there was no evidence that the notice had in fact been mailed or delivered within the statutory period; and, secondly, that the notice was in form defective under this statute, *because it failed to state that the policy would be null and void if the premium was not paid when due*, and stated instead that members neglecting to pay premiums when due were "*carrying their own risk*", which the Court of Appeals held might be misunderstood by ignorant policy-holders and did not necessarily apprise them that if they failed to pay premiums their policies would be forfeited. It further appeared in that case that the premium fell due December 31, 1882, and was not paid;

but that it was tendered to the company *on January 15, 1883*, and refused, and that the insured died later in that day.

The other New York case cited by the Circuit Court of Appeals as "equally in point and decisive of the law in New York", is *Schad v. Security Mutual*, 155 N. Y., 640. In this case the Court of Appeals rendered no opinion, but the opinion of the Appellate Division of the Supreme Court reported in 11 App. Div., 487, at 489 states that the question before them for determination was

> "whether a notice which states that '*if your payment should not be made when due, your policy would cease to be in force*' complies with a statute which requires that the notice shall state that if the premium is not paid when due, the said policy 'and all payments thereon will become forfeited and void.'"

This question they answered in the negative, and properly so, since to state that in a certain contingency a policy will cease to be in force is very different from stating that in that contingency "*the policy and all payments thereon will become null and void.*"

In *Hicks v. National Life Insurance Co.*, 60 Fed. Rep., 690, the defect in the notice was that it was not mailed to the insured a sufficient number of days in advance of the due date of the premium.

In *Provident Savings Life Assurance Society v. Nixon*, 73 Fed. Rep., 144, the notice was held insufficient because there was no evidence that the postage was prepaid.

In *Equitable Life v. Nixon*, 81 Fed. Rep., 796, the principal question as to the notice was whether the assured could give evidence to rebut the presumption that the notice was mailed which arose from an agent's affidavit of mailing.

Born v. Home Insurance Co., 81 Northwestern Reporter, 676, and *Smith v. Continental Insurance Co.*, 79 Northwestern Reporter, 126, were both cases arising under a notice required by an Iowa statute and involved policies of fire insurance.

The only other case cited by the Circuit Court of Appeals was *New York Life Insurance Co. v. Dingley*, 93 Fed. Rep., 153, in the Ninth Circuit which does support the Court's construction of the statute in the case at bar :

This was a most extraordinary decision. It appeared and was found by the court that the notice given exactly complied with the terms of the statute. The premium became due July 19, 1896. The notice sent June 27, 1896, not less than fifteen nor more than forty-five days prior to the date when the payment fell due, stated, in the language of the statute, that unless the premium to come due July 19 'shall be paid to the 'company, or to a duly-appointed agent or person au- 'thorized to collect such premium, by or before the 'day it falls due, such policy and all payments thereon 'will become forfeited and void.' But because the statute itself provided that 'No such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice,' and because the policy allowed a month's grace in which to pay the premium, the Circuit Court of Appeals held that this notice did not comply with the *intention* of the statute, and, therefore, that the policy could not be forfeited. In other words, the court held that by following the requirements of the statute literally the insurance company had forfeited the right to avail of its provisions, which alone restricted it in exercising the right of forfeiture.

The court in that case based this amazing decision upon its interpretation of the decision by the Court of Appeals of the State of New York in *McDougal v. Society*, 135 N. Y., 551, where a notice which did not literally comply with the statute, *was nevertheless held sufficient to sustain a forfeiture of the policy for failure to pay the premium* either at the time when it fell due, or within the period of grace permitted by statute and policy. The policy before the Court of Appeals in the McDougal case was not an ordinary life insurance policy. It was a beneficial society policy made origi-

nally for the term of one year, the company promising (p. 553)

> 'to renew and extend this insurance during each 'successive year from the date thereof, upon con- 'dition that the assured shall pay, on or before 'the 23rd day of July in each successive year 'during the continuance of the contract, the mort- 'uary premium,—and also an expense charge of 'Three Dollars on each $1,000 insured therein; 'the payment of said annual mortuary premium 'and the annual expense charge being the consid- 'eration for the continuance of the insurance in 'each successive year, etc.'

The notice was seasonably mailed to the insured under that policy advised him that

> 'in order to continue and extend the insurance 'it will be necessary that the payments required 'for that purpose shall be paid on or before the 'date above mentioned as stipulated in the policy 'contract.'

The Court held that in view of the character of the policy, the notice to be given could not closely conform with the statute, inasmuch as the yearly method of insurance was of a special character.

GRAY, J., at page 556:

> 'It could not state that if the 'premium' was 'not paid, the policy and all payments thereon 'would become forfeited and void; for that would 'not be accurate. Something more than a pre- 'mium was to be paid to extend the contract of 'insurance, and, therefore, the company notified 'him that certain 'payments' were necessary for 'that purpose.'

The Court then continued as follows:

> 'The obligation of the statute must not be un- 'reasonably insisted upon. It provides for the 'giving of a notice which shall be unambiguous 'and intelligible to all. When applied to an in- 'surance contract out of the ordinary form, it 'secures to the assured such a notice as will con- 'tain statements reminding him of when and 'where he is to make any payments pursuant to 'the terms of the contract, their amount and the 'effect of non-payment. The statute was not 'made to operate harshly upon the insurer, but to

'afford a protection to the assured by the reasonable requirement of a notice, couched in plain terms, from the insurer before the interest of the assured could be forfeited.'

An application was made to this Court by the plaintiff in error, the New York Life Insurance Company, in the *Dingley* case, for a writ of *certiorari*, but that writ was denied (see 176 U. S., 682, Case No. 325).

Upon examining the record in that case we find that, before making the application for the writ, the life insurance company had *voluntarily* paid the judgment awarded against it below, although no execution had been issued, and that that fact was urged by the defendant in error as one reason for not granting the writ.

The Court in the *Dingley* case relied upon the *Phelan* case *(supra)* and the following three cases:

De Frece v. National Life Insurance Co., 136 N. Y., 144, where the Court held that the insurance company by agreement had waived the right to insist upon the forfeiture of the policy for non-payment of the premium.

In *Baxter v. Brooklyn Life Insurance Co.*, 119 N. Y., 450, no notice whatever was sent the insured.

In *Carter v. Brooklyn Life Insurance Co.*, 110 N. Y., 15, the notice was sent to the wrong person.

This lengthy review of the authorities is given to impress upon this Court the fact that the case at bar and the Dingley case are not supported by decisions of the Courts in New York or elsewhere.

The reasoning of the opinions in these two cases is also unsatisfactory and unsound. For example, in the Dingley case, one fault found by the Court with the notice was that it did not inform the insured of the statutory provision forbidding forfeiture until thirty days after mailing the notice.

Nowhere in the statute is there any intimation that the notice should furnish this information, and the course of legislation shows that the Legislature did not intend that it should. Chapter 690 of the Laws

of 1892, of New York, which contains Section 92, codified the insurance laws and repealed Chapter 321 of the Laws of 1877 (an earlier statute upon this subject), re-enacting in Section 92 many of the provisions of the statute repealed. The earlier statute permitted forfeiture of a policy provided a notice was sent that the premium was due and unpaid and continued:

> "such notice shall further state that unless "the said premium or interest then due "shall be paid to the company or to a duly ap- "pointed agent or other person authorized to col- "lect such premium *within thirty days after the* "*mailing* of such notice, the said policy and all "payments thereon will become forfeited and "void."

In re-enacting many of the provisions of this statute in Section 92 the legislature deliberately left out the provision of the earlier statute requiring the notice to inform the insured of his privilege to prevent forfeiture by payment of the premium within thirty days after the mailing of the notice, although the legislature in Section 92 still conferred this privilege upon the insured. The conclusion is irresistible that in thus selecting some parts of the earlier statute and incorporating them in Section 92 and in discarding others and failing to incorporate them, the legislature intended to exclude from the spirit as well as the letter of the new statute the omitted requirements of the earlier one. The reasoning, therefore, in the *Dingley* case that the notice was defective, because it contained no information of the thirty days of grace allowed by the statute, is unsound.

Up to this point the argument has been confined solely to the cases cited and the statutory provisions and it is submitted that neither required the premium notice sent Meinert to inform him of his statutory privilege of paying the premium within thirty days after the mailing of the notice nor of the privilege accorded him by the policy of paying it within thirty days after it fell due.

The only remaining ground upon which it could be

contended that the Meinert notice was defective would be that it was not in conformity with the provisions of the policy ; but an examination of the contract fails to reveal that it requires any notice as a pre-requisite to forfeiture. The only provisions upon the subject of notice contained in the contract are in Article II. of the Conditions and Requirements which is as follows :

> " In case of non-payment of any annual premium
> " or installment thereof, within thirty days after
> " the same shall fall due, this policy shall be null
> " and void, subject however to the provisions as
> " to cash surrender and paid up policy values.
> " The Company will, however, as a matter of favor
> " and not of right, mail notice to the insured or
> " assignee, at the last address furnished by him or
> " them to the Company, to the effect that the policy
> " may be re-established by the payment of the
> " annual premium or installments thereof still due,
> " within ten days after mailing said notice " (Rec.,
> " p. 6).

It is apparent that this article did not require the first notice sent Meinert to be in any particular form, since it does not require any notice whatsoever to be sent to him.

It only provides that, if Meinert failed to pay his premiums within thirty days after they fell due, his policy should become void, and added that, as a matter of *favor* and *not* of right, the company would mail him a notice to the effect that he might re-establish his policy, if he paid his premium within ten days after mailing this notice.

In spite of the fact that Meinert was not *entitled* to any notice under this provision of the contract, such a notice was mailed to him April 3, 1897, and received by him April 5, 1897 (Rec., p. 34, Eighth Finding of Fact).

The provisions of the contract, therefore, cannot be invoked to support the contention that the first notice sent Meinert was in any way defective.

The Circuit Court of Appeals also reasons in ruling

that the first notice sent Meinert was defective that the notice

> " is furthermore quite misleading. The insured is
> " notified that his premium is due the 5th day of
> " March, and unless he pays it '*by or before that*
> " *day*' his policy will be forfeited and void."
>
> " Whereas by the terms of the policy he has
> " thirty days after March 5th in which to pay it "
> (Rec., p. 116).

Of course, unless Meinert was actually misled by this notice, this criticism is only academic. But how could he be misled by it? He had the same means at his disposal for ascertaining the true contract between himself and the insurance company that it had. The policy was in his possession and he must be presumed to know the contents of the contract of insurance to which he was a party.

If at the time he received the notice informing him that unless he paid his premium March 5, 1897, his policy would become forfeited, he failed to remember the policy's provisions, he had only to turn to it to see in the Second Article his privilege of keeping the policy alive by paying his premium within thirty days after its maturity. If he was too stupid or unintelligent to do this, nevertheless, he received a second notice April 5, 1897, which informed him that he could re-establish his policy by paying the premium within ten days.

Under these circumstances, we submit that the criticism that the first notice was misleading is hypercritical.

In *Mutual Life Insurance Company vs. Phinney*, 178 U. S., 327, Mr. Justice BREWER overruled a similar contention, that the insured had been misled into an abandonment of his policy by a misrepresentation of an agent of the insurer that the policy was forfeited, although no notice had been given as required by the New York Statute, saying at page 342:

> " And so when these two parties, the insurance company and the insured, dealing as we are now supposing in a contract which they mutually agree

should be determinable by the laws of New York, it is an absolute presumption that each knew those laws, and that neither one could be misled by statement in respect thereto on the part of the other.

"Whatever opinion either might express in reference to those statutes, was a mere matter of opinion. He was chargeable with knowledge, just exactly as the insurance company was."

It is respectfully submitted:

FIRST. The notice sent Meinert was in complete conformity with the New York Statute.

SECOND. Aside from the *Dingley* case, no case supports the Circuit Court of Appeals' construction of the New York Statute as to the requirements of the notice.

THIRD. This narrow and technical construction is not in accord with the letter or spirit of the statute. Nor can any good reason be given for its adoption.

FOURTH. There is no evidence that Meinert was actually misled as to his rights by the form of notice. On the contrary, he had at his disposal all the information as to his rights which the insurance company had, and he was also apprised by its second notice of his privilege.

FIFTH. The Circuit Court of Appeals therefore, erred in holding the first notice sent Meinert insufficient under the New York Statute to forfeit his policy.

POINT II.

Section 92 of the Insurance Law of New York is not applicable to the Meinert policy.

The application, the policy and the sixth Finding of Fact show that William Meinert, the insured, was from

the time he applied for the policy and until his death a resident of Evansville, Indiana (Rec., pp. 8, 4, 33). The application was made in Evansville, Indiana, to H. Lowenthal & Company, agents for the Insurance Company there (Application, Rec., p. 9).

It provided that the policy issued under it "shall not be in force until the actual payment and acceptance of the premium by said company, or its duly authorized agent" (Rec., p. 9).

The policy "was delivered and the first premium "paid thereon in the State of Indiana." This appears from the averments stipulated into the second and third paragraphs of the answer on the Record, at pages 15 and 16, which averments were admitted by the demurrers.

These demurrers were sustained and the plaintiff in error excepted to this ruling, assigned it as error and relies upon it for reversal here, as before stated.

Upon these facts, the place of the contract was the State of Indiana, under the ruling of this Court in *Mutual Life Insurance Co. v. Hill*, 193 U. S., 551, *Equitable Life Assurance Society v. Clements*, 140 U. S., 226, and *Mutual Life Assurance Society v. Cohen*, 179 U. S., 262.

These decisions also establish the proposition that "the statutory provision of the State of New York in "reference to forfeitures has no extra-territorial effect, "and does not of itself apply to the contracts made by "a New York company outside of that State."

In the case at bar this last rule would apply with even greater force, since the Nederland Life Insurance Company, Limited, is a Dutch corporation, organized under the laws of the Kingdom of Nederlands, and its only connection with the State of New York is that it is authorized to conduct business and maintains a branch office there.

The laws of the State of New York cannot apply to or control this Indiana contract between a resident of that State and a Dutch corporation unless these contracting parties have agreed that they shall.

The defendant in error may contend that the provision in the policy to pay the wife of the insured "at "the branch office in the City of New York," coupled with the provision that the premiums were to be paid at this same office (Record, pp. 4, 5), makes the place of the performance the State of New York and so subjects the policy to its laws. But the policy also provided that

> "Agents and other persons may be authorized to collect the premiums and to deliver receipts for same, (signed as stated above), but no receipt so given shall be valid unless countersigned by the persons so authorized. No payments made by any person, except in exchange for such receipt, will be recognized by the Company" (Article I *(b)* of Provisions and Requirements, Record, p. 5).

Moreover, the practice was to send such a receipt to Lowenthal, the company's agent in Indiana, and to stamp on the notice sent to Meinert a direction to pay the premium to Lowenthal (Fulker, Record, pp. 80, 81).

Under these circumstances, the provision in the policy for its payment and the payment of premiums in New York does not make the contract a New York contract. This is well settled by *Mutual Life Insurance Co. vs. Hill*, 193 U. S., 551, where the policy, and the premiums also, were payable in New York, and yet the Court held the policy a Washington contract, and that the laws of New York only applied by virtue of the stipulation of the parties. See, also, *Mutual Life Insurance Company of New York vs. Hathaway*, 106 Fed. Rep., 815.

The contention that Section 92 of the Insurance Law of New York applied to the Meinert policy, therefore, narrows down to the stipulation in the application

> "that the contract of insurance contained in the policy and in this application shall be governed by the laws of the State of New York, the place of said contract to be the principal office in the United States of said Company in the City of New York" (Record, p. 9).

The policy also referred to the application as follows:

> "In consideration of the application for this policy of insurance, which is part of this contract, and each of the statements made therein" (Rec., p. 4).

This language that the contract should be governed by the laws of the State of New York does not necessarily mean that all those laws should be applicable, certainly not when in conflict with other provisions of the contract, or when inappropriate thereto. Nor is there any good reason to suppose that the parties intended to make Section 92 of the Insurance Law of New York applicable to this policy.

An examination of Section 92 shows that it is not intended to have any extra-territorial force. For example, it provides for a fifteen days' notice to the insured of the maturity of his premiums. Now, while a notice mailed fifteen days before the maturity of a premium to a person having a post-office address in New York might well be a reasonable notice, such a notice to one living in China or in remote parts of the United States would be absurdly inadequate.

In the *Cohen* and *Hill* cases the Supreme Court, in deciding that Chapter 321 of the Laws of 1877 had no extra-territorial force, reasoned that the Legislature could not have intended the statute to be applicable to policy holders without the State, since a 30 days' notice would in such cases be often inadequate. This reasoning applies with even greater force to Section 92, which calls for a 15 days' notice.

The opening language of the statute, "No life insurance corporation doing business in this State," is a strong indication that the Legislature intended to confine it to local business alone.

The Legislature has announced in unmistakable language its construction of Section 92, amending it by Chapter 218 of the Laws of 1897, so that it now reads that the notice shall be mailed to the person insured "at his or her last known post-office address *in this State.*"

This amendment unless passed to effect a complete reversal of policy, clearly indicates that it was never the legislative intention to subject policies issued to holders residing without the State of New York to the provisions of Section 92.

Moreover, the section provides that the affidavit of an agent of the insurance company that the notice was mailed shall be presumptive evidence that such notice was given. It is unreasonable to suppose that the Legislature of New York assumed to prescribe a rule of evidence to be followed by the courts of other States.

All these features of the statute point to the conclusion that it was intended to be applicable solely to policies issued in, and held by persons residing in, the State of New York. What possible reason, then, can there be for ascribing to the parties to this contract of insurance an intention to incorporate in it a statute, in itself inapplicable and inappropriate to the contract? Since the statute bears on its face indications that the Legislature did not intend it to apply to non-resident policy-holders, even if delivered to them in New York, it is illogical to argue that the parties to this policy intended to make this statute applicable to the policy by saying that the contract should be governed by the laws of New York. What they intended, of course, was only such laws as were applicable and appropriate to such a policy.

In addition to this, the provisions of the Meinert policy show affirmatively that the parties did not intend to apply to it the New York statute on forfeiture by notice of premiums.

The provisions and requirements of the policy are expressly made a part thereof by the following language:

> "provided, however, that this policy is issued and accepted under and subject to the provisions and requirements printed or written upon the back of this policy, which shall be taken to be a part of this contract, as fully as if they were set forth at

length on the face of this policy and signed by the parties " (Rec., p. 5).

Article II. of these provisions and requirements provides :

" In case of non-payment of any annual premium or installment thereof, within thirty days after the same shall fall due, this policy shall be null and void " (Rec., p. 6).

Here is an explicit agreement made by the parties as to the effect of non-payment of the premium, providing that the resulting forfeiture shall take place thirty days after the premium falls due. This in itself is inconsistent with Section 92, which provides that forfeiture can only take place thirty days after mailing notice that the premium was to fall due.

But there are other more glaring inconsistencies between this article of the policy and the statute. The statute prescribes a certain notice as a prerequisite to forfeiture. The parties to this contract, in Article II., provide for a different notice, and distinctly provide that the company is not obliged to send even that. " The Company will, however, as a matter of *favor* " *and not of right*, mail notice to the insured," etc., that the policy may be re-established by paying the premium within ten days.

It is clear that this was the *only* form of notice called for by the contract between the parties to this policy and that when they agreed to Article II. of the policy the only things which they agreed to as to forfeiture and notice were what was *expressly* written out in Article II., and that neither of them could in reason have intended to override or modify this explicit agreement or to incorporate in it Section 92 of the Laws of New York by any such general reference as that contained in the application—*i. e.*, that the contract should be governed by the laws of New York.

It is submitted that under the ruling in *Mutual Life Insurance Co. vs. Hill*, 193 U. S., 551, the stipulation of the parties to the Meinert policy contained in Article II. thereof was paramount to the stipulation that the contract should be governed by the laws of New York,

and that Section 92 of the New York Insurance Law is not applicable to this policy.

In the *Hill* case the policy was issued by a New York corporation to a resident of Washington, where the policy was delivered and the first premium paid. No other premium was ever paid. Four years after the policy was issued the insured died and his children, the beneficiaries of the policy, brought an action to recover the amount of the policy, contending that it was saved from forfeiture by the New York statute, no notice having been sent to the insured pursuant to its provisions.

The Court held that the policy was a Washington contract, that the laws of New York had no extra territorial force and did not apply to this policy except by virtue of a stipulation contained in the application and providing that "the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York."

The Court held that, assuming that this provision made the New York statute, forbidding forfeiture for non-payment of premium without notice, applicable to the policy, that, nevertheless, no notice was necessary because the policy contained an express provision that any notice required by statute was waived. Judge BREWER said, at pages 557 and 558:

> "But assuming that the general declaration that the contract is to be held and construed to have been made in the city of New York, would, if there was nothing else, make controlling all the applicable statutes of that State, it is limited by other express agreements of the policy. Among these are that 'notice that each and every such 'payment is due at the date named in the policy 'is given and accepted by the delivery and accept-'ance of this policy, and any further notice re-'quired by any statute is thereby expressly 'waived,' and also that 'policy-holders must not 'expect to be notified when their premiums will 'be due. It is a practice of the company to send 'these notices, as reminders, when the address is

'known but no responsibility is assumed on the 'part of the company in consequence of their non-'reception.' Language could not be clearer to the effect that the party accepting the policy admits thereby the receipt of every notice in respect to the payment of premium which can be implied from any other part of the policy or required by any statute. The contention is that this express stipulation in reference to notice is nullified by the general provision that the contract is to be construed to have been made in the city of New York. It is urged that the laws of New York control in the construction of any contract made in that State, that they require notice as a condition of forfeiture and forbid a waiver of such notice, and therefore that the agreement in the policy in respect to notice is overthrown by the law of the State. But that assumes that the contract was made in New York, whereas it was in fact made in Washington, and the laws of New York are controlling in any respect only because the parties have so stipulated, and, as we have indicated, the stipulation in respect thereto is to be harmonized with the other stipulations in the contract. The ordinary rule in respect to the construction of contracts is this: that where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because when the parties express themselves in reference to a particular matter the attention is directed to that, and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought. Here, when the parties stipulate that no other notice shall be required, attention is directed to the particular matter of notice. When the stipulation is that the contract shall be construed to have been made in New York, no particular statute is referred to, and the attention may not be directed to the matter of notice or any other special feature of New York law. The special controlled the general; that which must have been in the minds of the contracting parties controls that which may not have been,

although included within the language of the latter stipulation. This is the general rule in the construction of all documents—contracts as well as statutes. * * *

"Obviously the express stipulation in the policy as to the matter of notice must be held paramount and to that extent limiting the provision of the New York law in reference to notice which was not specially referred to in the contract, and can be invoked only because it is one of the various statutes of New York applicable to insurance policies."

POINT III.

Meinert's acts in connection with this policy show that he abandoned it.

In the seventh paragraph of the answer the plaintiff in error sets up the defense that Meinert and the insurance company treated the policy as lapsed (Rec., p. 30). The fact is, as here pleaded, that, although Meinert received the first and second notices informing him of the maturity of his premium on March 5th, 1897, and the forfeiture of his policy unless he paid it, he never paid either that premium or any other thereafter, nor did anyone on his behalf ever pay any premium after December 5th, 1896.

The first intimation of any claim that the policy was not forfeited is contained in the letter of Mary Meinert's counsel to the plaintiff in error on May 15th, 1901, more than a year after Meinert's death on March 24th, 1900, and four years and a half after he had stopped paying premiums (Rec., p. 69).

Even, if it is conceded that the New York statute was made applicable to the policy by the agreement of the parties, it was perfectly competent for them to agree afterward that the policy should be forfeited regardless of the provisions of the statute.

It is submitted that Meinert's behavior in paying no premium on this policy after December 5th, 1896, and the Insurance Company's act on April 22d, 1897, in making a note in their records of the policy's forfeiture, show that both parties to this contract intended to and did abandon it. Meinert not only had notice from his policy that the premium was due on March 5th, 1897, and that the policy would be forfeited if it was not paid, but the court has found that he actually *received two* notices from the company (Rec., pp. 33, 34, Seventh and Eighth Findings). The first of these notices informed him that the premium was due March 5th, 1897, and that if it was not paid the policy would be forfeited. The second informed him that the policy had been forfeited for non-payment of the premium, but could be reinstated if the premium was paid in ten days. In spite of this, the insured failed to pay and continued such failure for three years, when his death occurred.

Ordinarily, if one party to a contract fails to perform his part, he cannot recover from the other. In the case at bar the complaint apparently recognizes this rule, for it alleges:

> "That the plaintiff has performed all the conditions of said policy and contract of insurance on her part to be performed, and the said William Meinert performed all the conditions of said policy and contract on his part to be performed" (Complaint, Rec., pp. 2, 3).

These allegations were denied by the first paragraph of the answer (Rec., p. 12), and no evidence was offered in support of them. The defendant in error must depend upon the theory that it is not necessary to show a payment or tender of the premiums on the part of Meinert, and that she can recover in spite of the long-continued default. Such a proposition is abhorrent to one's sense of justice, and in one case at least has been squarely overruled. In *Lone v. The Mutual Life Insurance Company of New York*, 33 Washington, 577,

the defendant, a New York corporation, on November 8th, 1889, issued a policy of insurance upon the life of Rex, who paid one semi-annual premium and none thereafter. Twelve years later Rex died, and his administrator brought an action to recover upon the policy. The plaintiff contended that the New York statute prevented forfeiture of the policy because no notice had been sent to Rex. The Court held, however, that Rex's neglect to pay the premiums for so many years amounted to an abandonment of the policy by him and he could not recover. The Court said (at pp. 579, 580, 581):

"* * * conceding that the contract was to be construed with reference to the New York statute relied upon by the respondent, we do not think the respondent should recover in any event for it appears that the claim is a stale one. When a man neglects for twelve years to make annual or semi-annual payments provided for in an insurance contract, and never in fact makes any deferred payment whatever, in the absence of a showing to the contrary he ought to be held to have rescinded the contract which was made with special reference to such payments, they being in fact the actual consideration for the performance of the contract on the part of the insurance company. The statute, it is true, provides that no life insurance company shall have power to declare forfeited or lapsed any policy by reason of the non-payment of any annual premium unless notice be given in a specified manner, but a statute must be construed, and its provisions enforced, with reference to its objects, and the legislature, taking into consideration the infirmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what in homely phrase is termed 'snap judgment' on its patrons, thereby depriving them of the benefit of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness. This was not a law enacted in the interest of public policy, rights under which could not be waived, but it

was made for the benefit of individuals who have power to waive the rights conferred. Statutory rights and even constitutional rights may be so waived.

Cooley's Const. Lim. (6th Ed.), p. 214.

"The real question at issue is, was the conduct of Rex such as to warrant the action of the company in declaring the contract rescinded, and proceeding with its business and making its calculations as though the contract were so rescinded.

* * * * *

"We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived. In Shutte vs. Thompson, 15 Wall., 151, where a party was standing upon his statutory right in relation to the notice concerning depositions, the Court said that it was not doubted that all the provisions of the statute respecting notice to the adverse party could be waived by him; that a party could waive any provision either of a contract or of a statute intended for his benefit; and that, if a course of action on his part had misled the other party, he ought not to be allowed to avail himself of his original rights, because under such circumstances he would be availing himself of what was substantially a fraud, and that he should not be allowed to reap any advantage from his own fraud."

This case was quoted with approval upon this point by the Supreme Court in *Mutual Life Insurance Co. v. Hill*, 193 U. S., 551, at page 560, the Supreme Court quoting the language of the opinion in the *Lone* case, and saying (at p. 559):

"Beyond the proposition that by the terms of the policy the insured was bound to take notice of

the time when the payment of the second premium was due, it was also shown by the testimony that the renewal receipt was forwarded to the local agent at Seattle and by him presented to the insured, so that there was notice in fact as well as notice implied from a receipt of the policy. Under those circumstances, the insured failed to pay, and continued such failure for four years prior to his death. Yet, notwithstanding his failure to perform his part of the contract—and performance by the insured underlies the obligation of the insurance company to perform on its part—this action was brought to compel the same performance by the company that would have been due if he had performed. It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. It is true cases arise in which one party is enabled to take advantage of some statutory provision and exact compliance from the other without having himself first complied, and courts may not ignore the scope and efficacy of such statutory provisions, but, nevertheless, a judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing. We have had before us a series of cases coming from the same jurisdiction in which, when the insured had for a series of years neglected to pay their insurance premiums or perform their parts of the insurance contract their heirs or beneficiaries have, on their deaths, sought to obtain judgments against the insurance company for the amounts which would have been due on the policies if the insured had performed their stipulations in respect to the payment of premiums. Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defences to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid."

See, also, *Mutual Life Insurance Co. v. Phinney*, 178 U. S., 327, at page 344.

This particular point has not been passed upon by the courts of New York. In fact, it could not have arisen, since in none of the cases discussed in this brief, except the *Lone* and *Hill* cases, had there been any long-continued default in the payment of the premiums before the death of the insured.

In the *Dingley* case, *supra*, the default occurred on July 19th, 1896, and the insured died November 12th, 1896.

In *Phelan v. Northwestern Mutual Life Insurance Co.*, 113 N. Y., 147, it appeared that the premium fell due December 31st, 1882, and was tendered to the company at two o'clock upon January 15th, 1883, but was refused. The insured died on the night of that day.

In *Schad v. Security Mutual Life Association*, 11 App. Div., 487, N. Y. The insured had paid the premiums for five years and failed to pay that due September 28th, 1892. He died October 9th, 1892.

In *Hicks v. National Life Insurance Co.*, 60 Fed. Rep., 690, the insured had paid premiums for three years. He then defaulted in payment of the premium due December 2d, 1891, and died on December 10th, 1891.

In *Provident Life Assurance Society v. Nixon*, 73 Fed. Rep., 144, there were two policies of insurance involved. Default was made in the premium due on one on October 11th, 1890, on the other on September 12th, 1890. The insured died on April 16th, 1891.

In *De Frece v. National Life Insurance Co.*, 136 N. Y., 144, the insured had paid all the premiums due for five years, and the default occurred in one falling due twenty-three days before his death. The case was decided on the ground that the company had agreed to waive the default.

In *Baxter v. Brooklyn Life Insurance Co.*, 119 N. Y., 450, the default occurred in not paying the premium due August 24th, 1884, and the insured died September 7th, 1884.

In *Carter v. Brooklyn Life Insurance Co.*, 110 N. Y., 15, the insured had paid the premiums from 1870 to October, 1883. The notice to pay this was sent to the wrong address by the company, and plaintiff, soon after it was due, tendered his premium, and, when this was refused, brought an action to have the policy reinstated.

The amendment of Section 92 by Chapter 218 of the Laws of 1897 indicates that a recovery on a policy after a long-continued default in payment of the premiums is not in accord with the legislative intent.

In fact, as the statute now reads, it is expressly forbidden. The amendment added to Section 92 this provision:

> "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

This amendment is declarative of the legislative intent even prior to its passage and throws light upon the purpose of Section 92 prior to its amendment.

It is submitted that in accordance with the views expressed in the *Hill* case and the ruling in the *Lone* case a recovery upon the Meinert policy would work a grave injustice and is not supported by the authorities or in accord with the intent of the New York statute.

Moreover, this Court is not hampered by any decision of the courts of New York in favor of such an oppressive and technical construction of the statute, and is therefore completely free to construe it so that it shall not work out an injustice evidently never intended by it.

POINT IV.

It is respectfully submitted that the judgment should be reversed.

GEORGE COGGILL,
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IN THE SUPREME COURT OF THE UNITED STATES.

THE NEDERLAND LIFE INSURANCE COMPANY, Limited,
Plaintiff in Error,
vs.
MARY MEINERT, Defendant
in Error.

No. 6[illegible]
Docket 11

BRIEF FOR DEFENDANT IN ERROR ON PETITION FOR CERTIORARI.

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Attorneys for Appellee.

[redacted]

LEDERER PRINTER, INDIANAPOLIS, IND.

IN THE SUPREME COURT OF THE UNITED STATES.

THE NEDERLAND LIFE INSURANCE COMPANY, Limited, Plaintiff in Error,
MARY MEINERT, Defendant in Error.
} No.

BRIEF FOR DEFENDANT IN ERROR ON PETITION FOR CERTIORARI.

1. The ground upon which this court is asked to have this case brought up, is, as we understand it, to decide whether a notice to the insured that his premium is due on a *certain date and that unless paid at that time* the policy will be forfeited, is sufficient under the New York statute, where the policy provides for a forfeiture only on the the failure to pay the premium *within thirty days after that date.* In this case the policy provides that a failure to pay any premium within thirty days after the same becomes due shall result in a forfeiture. The premium became due on the 5th day of March, and the notice informed the insured of this, but instead of stating that payment must be made within thirty days from that date, as provided by the contract, it stated that a failure to pay on the date when the premium was due, would result in a forfeiture.

The intention of the legislature in enacting this statute evidently was to secure a reminder to the policy holder of the time when his premium became due, and of the time when a forfeiture would result and his rights would be lost if the premium was not paid. It must be apparent therefore that a notice such as was given in this case, instead of being a help to the insured, is, on the contrary misleading and a stumbling block.

The ground upon which the court is asked to hold this notice is sufficient is, as we understand it, that the exact literal terms of the statute must be complied with in giving the notice, regardless of the terms of the contract. The statute provides that the notice shall state the date when the premium is due and that unless it shall be paid "by or before the day it falls due the policy and all payments thereon will become forfeited and void, etc." The question presented therefore is whether or not the exact literal terms of the statute must be followed rather than the spirit and intent of the legislature, where to follow the language of the statute literally would be to contradict the terms of the contract. This is not a new question, but has been decided by the Court of Appeals of the State of New York in McDougal vs. Society, 135 N. Y. 551. In that case the contract was for a term insurance for one year with the privilege of renewing from year to year by paying a premium at a stipulated time. It would not have been correct therefore to have followed the terms of the statute literally and to

have stated that unless the premium was paid etc. " the policy and all payments thereon will become forfeited and void," in the language of the statutes, and the notice did not do so, but followed the terms of the contract, and informed the insured of the date when the premium was due, and that in order to extend or renew his insurance he would have to pay the premium at that time. The language of the notice was as follows: "In order to continue and extend the insurance it will be necessary that the payments required for that purpose shall be paid on or before the date above mentioned as stipulated in the policy contract."

The Court said:

"The respondents say * * * that it is not in conformity with the provisions of the statute for not literally following statutary language."

The Court further says:

"The notice was to remind the insured of the privilege he possessed of electing to have the contract continued and extended over the ensuing year and of the conditions of its exercise. It could not be said that if the premium was not paid the policy and all payments thereon would become forfeited and void, for that would not be correct. * * * When applied to insurance contracts out of the ordinary form it secures to the insured such a notice as will contain statements reminding him of when and where he is to make any payment persuant to the terms of the contract, their amount, and the effect of nonpayment."

The notice was held sufficient. The language of the court in this case is applicable to the case at bar. In the case at bar the notice should not have followed the language of the statute literally, and stated that the policy would be forfeited if the premium was not paid on the date when due, when such was not the case under the terms of the contract.

Counsel criticise the court in the case of New York Life Insurance Company vs. Dingley, 93 Fed. Rep. 153, for basing its decision on the case we have just cited. The court in the Dingley case followed the holding of the New York Court in the McDougal case, holding as the New York Court of Appeals held in that case, that the notice must conform to the contract, and held a notice insufficient which stated that a forfeiture would occur if the premium was not paid on the day it became due, where by the terms of the contract the insured was given thirty days of grace, and the forfeiture was not to occur until the expiration of that time. The facts in the Dingley case are very similar to the facts in the case at bar. There was more reason, however, for holding the notice sufficient in the Dingley case, than there is in the case at bar; for in the Dingley case, while the notice informed the insured that the premium must be paid on the day when due in order to avoid a forfeiture, ignoring the thirty days of grace, there was a foot-note which called atten-

tion to the clause in the policy giving thirty days of grace. In the case at bar there is no explanation whatever or reference to the thirty day clause. The notice simply tells the insured that a failure to pay the premium on the day when due will result in a forfeiture.

It is hardly necessary, we take it, to burden the court with a discussion of the notice which the company sent to the insured on the third day of April notifying him that his policy could be reinstated by paying the premium within ten days from that date. The notice tells him that the policy is void, and is not intended to notify him of the time within which the premium can be paid under the terms of the contract, but is based upon another provision in the policy where the company agrees to allow such reinstatement. We might in passing, however, call the attention of the court to the fact that the company did not conform to its agreement even in this respect. The agreement is to notify the insured that he may have ten days to reinstate his policy after the forfeiture. The premium became due on the 5th day of March, and thirty days from that day would be the 4th of April, but since the 4th day of April fell on Sunday, this day would not be counted and the insured would have all of the 5th in which to pay the premium.

2 May on Insurance, section 349;

2 Joyce on Insurance, section 1129;

The company should therefore have given him

ten days from the 5th day of April in which to reinstate, but they violated their agreement with him in this respect.

There are other reasons why the judgment should have been affirmed in the Circuit Court of Appeals, and we submitted an argument and authorities, to show that the company had repudiated its contract, and regardless of the New York statute, had placed itself in such a position that it could not insist upon a forfeiture. But the Circuit Court of Appeals decided the case before it reached this question. As we understand, however, the only question before this court upon this application is that set out by the appellant in its petition and therefore we will not extend our argument to other questions.

2. We submit that there is nothing of great importance to the public involved in this question. The question having been decided by the Court of Appeals of New York in the case referred to above, and having been followed by the Federal Court in the Dingley case, it is not likely that any insurance company has fallen into this error since these decisions; at least it seems that this company changed the form of its notice; for the president testified that more than seven years ago the form of the notice was changed and that thereafter the notice thich was issued stated, "unless such premium be paid *in accordance with the conditions of your policy etc.*, the policy and all payments thereon will become for-

feited and void." Evidently the officers of the company had been advised by their counsel that the notice they had been giving was defective, and therefore it was changed. They are in a position therefore of asking this court to hold a notice sufficient which they testify that they themselves had discarded as insufficient more than seven years ago. (See Record pages 64 and 65.) We submit therefore, that this question is not one of any great importance even to them, aside from this particular case. The question here presented has never arisen in any of the courts, either State or Federal, so far as we have been able to learn, except in the two cases we have cited, to wit, the McDougal case in New York and the Dingley case in the Federal Court, and these decisions are harmonious. There is therefore no conflict in the decisions of the courts upon this question. It does not appear to be one that has frequently arisen, and, moreover, in view of the decisions referred to, it is one that is not likely to arise again.

3. Has the petitioner complied with the rules of the Court in bringing up the reord?

Respectfully submitted,

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Attorneys for Appellee.

Supreme Court of the United States

OCTOBER TERM, 1904

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED,
Petitioner,
Plaintiff in Error,

VS.

MARY MEINERT,
Defendant in Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. IN ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

BRIEF OF MARY MEINERT, DEFENDANT IN ERROR

BRIEF AND ARGUMENT

POINT I.

THE REPUDIATION OF THE CONTRACT BY THE COMPANY BEFORE THE EXPIRATION OF THE TIME FOR THE PAYMENT OF THE PREMIUM, EXCUSED THE INSURED FROM THEREAFTER MAKING A TENDER OF THE SAME.

It is a general principle of law that, where one party to a contract repudiates it, the other is excused from thereafter tendering performance of any of the conditions required of him to be performed. The authorities on this proposition are collected in 4 *Enc. of Pleading* &

Practice, 630, *Note* 1. The following Indiana cases will be found to be in point:

Hanna vs. Phelps, 7 Ind. 21;

House vs. Alexander, 105 Ind. at p. 112;

Tobin vs. Young, 124 Ind. at p. 512;

Turner vs. Perry, 27 Ind. 163;

Blair vs. Hamilton, 48 Ind. 32;

Willcuts vs. Northwestern Mutual, etc. Co., 81 Ind. at p. 312.

An insurance case in point is *Phoenix, etc. Insurance Company vs. Hinesley*, 75 Ind. 1.

This principle of law has been applied to the payment of premiums on a policy of insurance in the following cases:

Manhattan Life vs. Smith, 44 Ohio St. 156;

Sourwine vs. Supreme Lodge K. of P., 12 Ind. App. 447;

Heinlein vs. Ins. Co., 101 Mich. 250;

59 N. W. 615;

25 L. R. A. 627.

45 *American State Reports*, 409;

Union Central Life Ins. Co. vs. Caldwell (Ark.) 58 S. W. 355;

National Mutual vs. Home Benefit (*Pa.*) 37 Atl. 519;

Guetspow vs. Mich. Mut. (Wis.) 81 N. W. 652;

Supreme Lodge K. of H. vs. Davis (Col.) 58 Pac., 595;

Supreme Council vs. Bailey (Ky.) 55 S. W. 888;

Dennison vs. Masonic Fraternal Society, 69 N. Y. Supp. 291;

TeBow vs. Wash. Life, 69 N. Y. Supp. 289 and authorities cited;

Sullivan vs. Industrial Ben. Ass'n., 26 N. Y. Supp. 186.

By the terms of the policy in this case, the premium was due on the 5th. day of March. The forfeiture clause on the back of the policy is as follows:

"In case of non-payment of any annual premium, or installment thereof, *within thirty days after the same shall fall due,* this policy shall be null and void, etc." (Record P. 6 and p. 32.)

On the 15th. day of February, the defendant mailed notice to the insured that the premium was due on the 5th. day of March, and that if the same was not paid "by or before that date," the policy and all payments thereon would be forfeited and void. Here the insured is distinctly told that on failure to pay his premium by the 5th. of March, his policy will be forfeited, which is equivalent to saying, that after that date the Company will refuse to recognize his having any right under the contract.

In *May on Insurance,* Sec. 358, the author says:

"Payment or tender of payment of premiums is not necessary where the insurers have already declared the policy forfeited or done any other act which is tantamount to a declaration on their part that they will not receive it if tendered."

In 19 Am. & Eng. Enc. of Law, (2nd. Ed.) p. 57, it is said:

"Where an insurer by already declaring a forfeiture or by other acts or conduct clearly indicates that if tender is made, it would not be accepted, the insured is excused thereafter from making payment or tender of payment, according to the terms of the policy."

But this is not all. The company notified him further by a notice mailed at Chicago on the 3rd day of April following, that his policy *was* forfeited. (Record p. 3 and 34.) This notice, the Court found, was received at 8 o'clock on Monday morning, April 5th. (Record p. 34.) Since the month of March has 31 days, the time for payment of the premium would expire at midnight on the 4th. day of April; but as this date falls on Sunday, it would not be included, and the insured would have all of the following Monday in which to make the payment.

2 *Joyce on Insurance,* Sec. 1129;

2 *May on Insurance,* Sec. 349;

It will be seen, therefore, that before the expiration of the time for the payment of the premium, he was notified that his policy was forfeited.

It was contended at the trial, that since this notice mailed on the 3rd. day of April, contained an offer to reinstate the policy within ten days from that date, the plaintiff was not excused from tendering payment. But this offer was not to accept the premium in performance of the conditions of the contract, but to accept it by way of re-instatement, which involved an acknowledgement of the forfeiture. Payment by way of re-instatement, and payment in performance of the conditions of the contract effect the insured's rights differently; for, even though the company offered to accept the money and make the reinstatement unconditionally, yet, if the insured had died before the money had been received, his rights would have been gone. There would be an interval of time during which he would be wholly without insurance; whereas, under the terms of his contract, he was entitled to continuous insurance. It follows then, that since the Company refused to accept the money according to the terms of the contract, the only terms upon which the insured was required to pay it, he was not required to tender it.

It will be observed further, that the Company did not do as it agreed to do in regard to giving time for the re-instatement of the policy. The condition on the back of the policy was as follows:

> "The Company will, however, as a matter of favor, and not of right, mail notice to the insured, or assignee, at the last address furnished by him, or them to the Company, to the effect that the policy may be re-established by the payment of the annual premium, or installment thereof still due, within ten days after mailing said notice." (Rec. p. 6.)

It is true the Company says it will give this notice as a matter of favor, and not of right, but nevertheless, it agreed to give it, and did not do so. The insured was entitled to ten days from the 5th. day of April, but the Company gave him ten days from the 3rd. day of April, thus cutting him short two days as to this right.

We call attention to the fact, that the conduct of the Company was bewildering and misleading throughout. First, the notice was sent the insured that if he failed to pay his premium on the 5th. of March, his policy would be forfeited. Being an unlearned Holland Dutchman, insured in this Holland Company, and getting such a notice, he would naturally suppose that after the 5th. day of March his policy was forfeited, and his rights gone, and, he would probably make no arrangements thereafter to pay the premium. Later on he gets a notice from the Company telling him his policy *is* forfeited, but that the Company will re-instate it on payment of premium within ten days. In the meantime he may have made such arrangements as not to be able to meet the payment. These considerations will have a bearing upon the question of the sufficiency of the notice under the New York statute, to which we shall call attention later.

As to the payment of installments of premium falling due after the 5th. of March, no tender was necessary for the additional reason that the Company actually cancelled the policy on its books on April 22nd. (Record 14, 18 and 34.)

POINT II.

THE CONTRACT IS GOVERNED BY THE LAWS OF THE STATE OF NEW YORK.

The controversy upon this proposition may be confined within very narrow limits. It may be conceded, to begin with, that the law, as declared by this Court in the *Cohen* and *Hill cases*, is that the New York statute, with regard to notice, has no extra-territorial application, and does not apply to contracts made outside the State of New York by New York companies, unless the parties have so agreed. On the other hand, we take it, the proposition will not be controverted that the parties have the right to make the contract subject to the laws of the State of New York, the place where the principal office of the Company in the United States is located, and, that if they have done so, the laws of the State of New York apply.

The language of the application, which is made a part of the contract, is as follows:

> "The contract of insurance contained in the policy and in this application shall be governed by the laws of the State of New York, the place of the said contract to be the principal office in the United States of said Company, in the City of New York."
> (Record p. 9.)

Here the contract not only provides that the contract shall be governed by the laws of the State of New York, but also that the place of the contract shall be the City of New York. It is, no doubt, an advantage to insurance companies to have their contracts all subject to the laws of the state where they have their principal office, as they can thereby adopt a uniform system of doing business, and in this case the Company was careful to make the provisions of the contract so clear and explicit, that there could be no doubt as to the intention of the parties.

There is nothing in the policy which in any way conflicts with this general agreement. In the Hill case, there was a specific provision that "notice, that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived." Since specific provisions in the contract prevail over general provisions, the logic of the decision in the Hill case on this point is invincible; for it is clear from this specific provision, that the parties did not intend that the New York statute, with reference to notice, should apply. It was specifically waived. But, there is nothing of this kind in the policy in the case at bar. There is nothing but a plain forfeiture provision, providing that on failure to pay the premium within thirty days, the policy shall be forfeited.

It has been contended by counsel, that this forfeiture provision is inconsistent, with the intention on the part of the parties that the New York statute with regard to notice should apply. But in this they are certainly mistaken. Without the forfeiture provision in policies

only inference. Meinert's failure to pay the premiums may have been due to a number of things, other than an intent on his part to forfeit his insurance. Suppose that he gave notes payable quarterly to cover the first annual premium, and that one of these notes was lost so that it could not be returned to him at the time it was paid, and that it was afterward found, and that the agent applied the amount paid in payment of the first installment of the premium for the year 1897, to the payment of this note, without the knowledge or consent of Meinert, and that on receipt of the notice of April 3rd, Meinert had the first intimation that his policy was forfeited, and that he then went to the office of the agent, and on going away expressed himself very forcibly and angrily in regard to the conduct of the agent. In such a case it is evident that the failure to pay premiums could not be said to be due to intent on the part of the insured to abandon his contract or any rights under it.

In an insurance case the plaintiff is frequently at a disadvantage from the fact that the principal witness is dead. If abandonment had been pleaded any declarations of the insured in regard to his treatment by the company which would tend to show what his intentions actually were would be material, since the intent is necessary to establish the defense of abandonment. If the daughter of the insured went with him to the office of the company, and while he went inside, remained without, this fact, together with what he said on coming out would be evidence on the question as to his intention on the issue of abandonment.

But the point is that it does not follow that the only inference to be drawn from the fact that no tender of the premiums was made after the alleged forfeiture, is that the insured intended to let his policy lapse. It may have been the fault of the company. Indeed what could Meinert have done after April, 1897? The company would not have accepted any payments after that time, and none could have been made by Meinert, however much he might have desired to do so. Not only had the company notified him that his policy would be forfeited on the failure to pay the premium on March 5th,

but it had thereafter on the 3rd day of April notified him that his policy actually was forfeited, and had followed this up by marking the policy cancelled on its books on April 22nd. Clearly Meinert was not under obligation to make tender thereafter. In addition to the authorities heretofore cited by us to the effect that no tender is necessary under such circumstances, we call attention to the case of Griesemer vs. Mutual Life Ins. Co., 10 Wash. 202, 38 Pac. Rep. 1031, which was cited and quoted from at length by this Court in the Cohen case. In that case, referring to the principle of law that a party to a contract must tender performance on his part before he can enforce performance on the part of the other part, the Court said:

> "There is, however, a well settled exception to this rule when it relates to the question of tender of money and that is that wherever it clearly appears that the tender, if made, would not have been accepted, the contract may be enforced without such tender."

If no tender was made therefore it was the fault of the Company.

But what steps could Meinert have taken other than he did to protect his interests? There were three legal remedies upen to him. First, he might bring an action for damages for breach of contract; secondly, he might bring an action in equity to compel a reinstatement of the policy; and third, he might wait until the obligation of the company matured and bring suit on the contract. But the last of these remedies is the only one that is practical in the State of Indiana. This is illustrated by the series of cases instituted a few years ago against the Mutual Reserve Fund Life Ass'n for breach of contract in levying illegal assessments on the older members of the Association with the intention of "freezing them out." In North Carolina where suits were brought for damages for breach of contract, it was held that the insured might treat the contract as rescinded from the beginning and recover the amount of the premiums paid with interest.

Strauss vs. Mutual Reserve, etc., 36 S. E. 352;
39 S. E. 55.

from that date in which to pay it, but the Company mailed notice to him that unless it was paid on the day when due, his policy would be forfeited. The question then is, whether or not such a notice is in conformity with the New York statute. It would seem, upon the face of the facts, that it would be difficult to find a notice which was more seriously defective. It is worse than no notice at all. The object and purpose of the New statute clearly is, to require the Company to notify the insured of the time when his premium is due, and of the time when the failure to pay the same will render his policy void. If the notice had stated nothing whatever, in regard to the time when the policy would become void, the defect would not have been so serious. It is true, it would not have complied with the New York statute, but it would at least have had one merit that the notice given had not; it would not have been misleading.

The construction of this statute has been before the Court of Appeals of the State of New York, the decisions of which Court, we take it, are the law of this case, and the opinions of that Court will show with what strictness the Courts of that State have required insurance companies to comply with the terms and conditions of the statute. One of the earliest cases, and perhaps the leading case, on the question of the sufficiency of notice under this statute, is the case of *Phelan vs. Northwestern Mutual, etc. Co.*, 113 N. Y. 147. Here the notice stated, "the conditions of your policy are, that payment must be made on or before the day the premium is due, and members neglecting so to pay are carrying their own risk."

At the bottom of the notice, the following also appeared:

> "Prompt payment is necessary to keep your policy in force."

It will be remembered that the New York statute requires the notice to state that, unless the premium is paid when due "the policy and all payments thereon will become forfeited and void." The only defect in this notice was, that instead of stating that the policy would become forfeited and void, it stated that members neglect-

ing to pay would be carrying their own risk, but the Court held the notice insufficient, saying:

> "We are also of the opinion that the notice does not in its terms conform to the statute. Many ignorant people and unlearned people seek to avail themselves of the advantages proposed by these companies. The statute is designed for the protection of all classes and the language it prescribes for the notices is intelligible to all. To say that in a declared event a policy will become forfeited and void conveys a meaning easily to be comprehended. To refer to the policy and its condition and say that members neglecting to pay are carrying their own risk is quite another thing; while it may be comprehensible to those versed in the language of insurance and accustomed to its phraseology it is not the language of the statute and does not embody the notice, which the statute requires."

Certainly, if the notice in that case is insufficient for not being clear enough, the notice in the case at bar is far more seriously objectionable, for the reason that not only is it not clear, but it is absolutely misleading, and misstates the terms of the contract.

It has been argued that the insured could read his contract, and thus determine what his rights were, but the same might be said by way of excusing the giving of notice altogether. The notice is intended to bring certain matters to the attention of the insured, without his referring to the terms of the contract.

Another New York case showing the strictness with which the statute is applied, is the case of *Schad vs. Security Mutual*, etc., 42 N. Y. Supp. 314, affirmed in 155 N. Y. 640, where the notice, instead of stating that the policy would be forfeited and void, was as follows:

"If your payment should not be made when due, your policy will cease to be in force."

The Court said:

> "The notice was in the nature of a warning to the policy holder. Significant and unequivocable language was specified in the statute and no good rea-

son was apparent in this case why it was not used in the notice given. The logic of the Phelan case, is I think, applicable, and the notice should be held to be insufficient."

Counsel have cited the case of *McDougall vs. Provident Savings Life Assurance Society*, 135 N. Y. 551, but this case does not sustain their contention. There was no defect in the notice in the McDougall case. The notice did not follow the terms of the statute literally, because to have done so would have contradicted the terms of the contract. The notice did not state that the policy would become "forfeited and void" in the language of the statute, on failure to pay the premium, because such was not the case. The contract was for term insurance for a year, with the privilege of renewal. Of this, the notice informed the insured and stated, "in order to continue and extend the insurance, it will be necessary that the payments required for that purpose shall be paid on or before the date above mentioned, as stipulated in the policy contract."

In other words the Court held that the notice should conform to the contract, and should not follow the language of the statute literally, where to do so would contradict the terms of the contract.

This decision is clearly in point here, for the Company is contending in the case at bar, that because it followed the statute literally in stating that the policy would become forfeited and void on failure to pay the premium on the date when due, this is sufficient, although the statement is not true.

In construing statutes, the Courts will seek to carry out the intention of the legislature. Evidently the Legislature never intended that the Company should notify the insured that his policy would be forfeited on failure to pay the premium on the date when due, when the contract did not so provide. What the Legislature meant by the time when due, evidently was the time within which payment must be made to avoid a forfeiture. The object and purpose of the Legislature evidently was to notify the insured of the time when his payment must be made in order to preserve his rights.

In construing this statute, with reference to a notice somewhat like the notice in the case at bar, though much more nearly in conformity with the statute, the Court, in the case of New York Life Insurance Company vs. Dingley, 93 Fed. Rep. 153, said:

> "These contradictory and inconsistent notices do not answer the requirements of the New York statute as construed by the Court of Appeals of that state, which demands a notice to the insured in plain and therefore unambiguous terms of the time when the premium will fall due *and of the time when a forfeiture will accrue, if not theretofore paid.*"

POINT IV.

THERE WAS NO ABANDONMENT OF CONTRACT.

We realize the full force of what has been said by this Court in the Hill case, and the moral effect of the decisions of this Court in the series of cases against the Mutual Life Insurance Company, reported in 178 U. S. 327 et seq. But the case at bar has nothing in common with these, except that there is the bare fact unexplained that after the alleged forfeiture in April 1897, the insured made no further payment or tender of premiums to the time of his death, which occurred a little less than three years thereafter. As to why the insured did so the record is silent, for the reason that this question was not in issue, as will be seen when we come to examine the pleadings. It clearly appeared in the Mutual Life cases that they were without merit, and that it was assumed by the Company with the consent and understanding of the insured that the policy was to be lapsed, and in one of the cases the insured had actually surrendered his policy, and in all of them the company in reliance upon this understanding omitted the giving of the notice required by the statute.

It has been sought to draw the inference from the fact that no payments were made after the alleged forfeiture, that the insured intended to abandon the policy and let it lapse. It is true that this is one inference that might be drawn from this fact, but it is by no means the

of life insurance, there would be nothing to which the New York statute could apply.

The Circuit Court of Appeals quoted in this case the following, with approval, from 19 Am. & Eng. Enc. of Law (2nd. Ed.) 44:—

> "Since forfeitures are odious in the eyes of the law, default in the payment of premium on life insurance does not forfeit the policy, where there is no stipulation to that effect in the policy."

This principle of law, we believe, has never been controverted. Therefore, if there was no such provision as this in the policy at bar, there would be nothing to which the New York statute could apply. The New York statute recognizes not only the right, but the custom of insurance companies to place these forfeiture provisions in their contracts, and in no way forbids it, but simply provides that before an insurance company can take advantage of such a clause, it must give a prescribed form of notice.

Neither is there anything inconsistent with the New York statute in the provision in the policy that the Company will give the insured notice that the policy may be re-instated within ten days after forfeiture. It is a provision frequently contained in insurance contracts, that the insured who has forfeited his rights, may re-instate his policy on certain terms and conditions within a certain time, and the provision for notifying the insured of this privilege is not inconsistent with the intention to notify him of the accrual of the premium, which is necessary, under the New York statute, before the forfeiture is incurred. The Company must first give the notice provided by the New York statute; then, if the premium is not paid according to the terms of the contract, the policy becomes forfeited. Thereafter the insured has ten days to re-instate his policy, and the Company agrees to give him notice to that effect. But it surely does not follow that, because the Company has promised to give him notice that he may re-instate his policy, that therefore, he is not entitled to the notice of the accrual of the premium, which is made a condition precedent by the statute to the right of the Company to forfeit his policy in the first instance.

But the provision above referred to in the contract, that it shall be governed by the laws of New York, is not the only part of this contract showing that it was the intention that he laws of that state should govern. Section 88 of the same chapter of the same Act of the Legislature, of the State of New York, is a non-forfeiture statute, which provides that the non-forfeiture provisions of the statute may be waived by a notice to that effect, in red ink on the margin of the policy.

On the margin of the policy in this case, in red ink, we find the following:

> "Notice is hereby given that the provisions of Sec. 88 of the Insurance law of 1892, of the State of New York, are waived by the provisions and requirements referring to the policy." (Rec. p. 5.)

The same provision is found in the application.

But further the notice which the Company claims to have mailed shows, that the Company was proceeding upon the theory, and understood, that the contract was governed by the laws of the State of New York as to notice, for the notice begins as follows:

> "Pursuant to chapter 690 of the Insurance Law of 1892, of the State of New York, you are hereby notified, etc." (Rec. p. 33.)

We do not think this matter can be put any more clearly than it has been put in the opinion of the Circuit Court of Appeals to which we especially call the attention of this Court. Furthermore, in the petition for certiorari, it was not even contended that the contract was not governed by the law of the State of New York in regard to notice, and this Court was not asked to transfer the case upon that question, and, as we understand it. this question cannot now be raised here.

POINT III.

THE NOTICE IS NOT IN COMPLIANCE WITH THE NEW YORK STATUTE.

As already stated heretofore, the premium was due on the 5th. day of March, and the insured had thirty days

In the case of Supreme Court A. L. of H. vs. Black, 123 Fed. Rep. 650, the same was held to be the law by the Circuit Court of Appeals.

On the other hand the Supreme Court of Minnesota held that the Association was entitled to compensation for carrying the risk to the time of the breach, and, therefore only nominal damages were allowed.

Ebert vs. Mutual Reserve, etc., 83 N. W. 506.

In Indiana the law is as laid down by the Supreme Court of Minnesota.

Metropolitan Life Ins. Co. vs. Bowser, 20 Ind. App. 557; 50 N. E. 86.

In Virginia the insured instituted an action in equity; but the court held that it had no jurisdiction in equity over a corporation organized in another state, and that the only place where the insured could resort to this remedy was in the state where the corporation was organized and located.

Taylor vs. Mutual Reserve, etc., 97 Va. 60.

This remedy therefore is attended with so much inconvenience as to take it out of consideration for practical purposes.

The third and last, therefore, is the only practical remedy that is open to the policy holder.

Phoenix Ins. vs. Hinesley, 75 Ind. 1.

Meinert, therefore, took the only practical course that was open to him.

Nor can the Company complain if this course was taken, especially in view of its conduct. It gets all the consideration that it could have gotten anyway. The policy provides that any indebtedness to the Company shall be deducted from the face thereof, (Record, page 4) and this was done. Not only did the Company get the consideration for the full time the risk was carried, to the date of the death of Meinert, but the Court gave it credit for the full annual premium for the year 1900, although the Company carried the risk for only a part of one month in that year. The Court gave the Company credit for all unpaid premiums with interest on each from the time it became due (Record, page 35). By this

method the Company lost nothing whatever, whereas in the case of a forfeiture of the contract the insured loses all he has paid.

There is nothing inequitable in this; but if the equities were in favor of the Company it should be the last to raise that question. An insurance company should be the last to complain if the court enforces the contract according to its terms as prepared by it. Insurance companies continually enforce the most inequitable forfeitures. Not infrequently a policy is forfeited where the insured has for years, and until the time of his death, made all payments in full, because of the failure through inadvertence or oversight, to make proofs of death within a prescribed time. Of late years it has often occurred that the right to paid up policies has been lost, a right for which the insured had paid, merely because of failure to apply in writing for this privilege within sixty days or six months after default. The books are full of cases where the insured has lost what he paid for in full, because of some oversight resulting in failure to perform some condition of the contract. Therefore, while we say that the outcome arrived at by the court in this case is not inequitable, yet if it were the contract should be enforced as made by the Company.

While we are on the subject of abandonment we should like to call attention to the significance of the fact that this cause has been removed from the state to the United States Courts. It is made the duty of the State Auditor in Indiana, to revoke the license of any company so removing a cause. *Burns Revised Statute of Indiana* of 1901, sec. 3460. Since the law presumes that an officer does his duty the presumption follows that the appellant is not doing business in Indiana. It is not likely that a company that is doing business in this country, and that desires to continue to do so, would want to incur this penalty. If it did not want to do business in this country it would perhaps be glad to have as many of its policies lapse as possible, and this may throw some light on the question as to who was anxious to abandon the contract.

POINT V.

THE QUESTION OF ABANDONMENT WAS NOT IN ISSUE.

In the fifth paragraph of answer, abandonment of the contract was fully and extensively pleaded, with all the elements of an estoppel, but when it came to the trial of the case, this defense was withdrawn by the Company, in consideration of the waiver of a trial by jury on the part of the appellee. This paragraph will be found at pages 20 to 23 of the Record, (see page 22), and on the 31st page is the following entry:

> "Come now the parties by counsel, and the defendant now withdraws the fifth paragraph of its answer herein. And the parties now file their waiver of jury herein, in the words following, to-wit."

Counsel who now represent the Company were not connected with the case at the time of the trial, and have, therefore, no doubt, overlooked this fact; otherwise we take it this issue would not now be raised. It is evident from the withdrawal of the fifth paragraph of answer that the Company intended to abandon the defense of abandonment; otherwise there would have been no reason for withdrawing it.

However, the seventh paragraph of answer, to which counsel now refer, does not plead an abandonment or attempt to do so. It is addressed to another defense altogether; but there occurs in the paragraph, as a part of a sentence, the language to which counsel refer, as follows, "and the said William Meinert and this defendant from that time on continually have treated said policy as lapsed, etc." (Record, pages 30-31.) Even if it were not evident that it was the intention to abandon this issue, it could not be said, we take it, that the mere fact that the parties might have treated the policy as lapsed is sufficient to estop the appellee. There must be two elements, we take it, to constitute the defense of abandonment. First, there must have been the intent to abandon on the part of the party who is alleged to have abandoned his contract, and secondly, the party setting up the defense of abandonment must have been prejudiced in

some way by relying on the acts of the other party, thus creating an estoppel. It surely does not follow that merely because a party may think his rights are gone and may act in this belief, that, therefore, he is precluded from recovery. Persons frequently wait until the statute of limitations has almost run before taking any steps to enforce their rights, by reason of ignorance of their rights, or for other reasons, and in the belief that their rights are gone, but this does not prevent their recovery.

In the Mutual Life cases, not only was the intention and the agreement to abandon the contract pleaded, but it was also alleged that the Company in reliance upon the acts of the insured, and the understanding and agreement, had omitted to give the statutory notice, thus setting up an estoppel; and these elemnts, we take it, must exist in order to establish this defense. It is evident therefore that this mere statement, as a part of a sentence, cannot be said to constitute a plea of abandonment that would constitute a defense to the action.

However, the insured, Meinert, could not estop the beneficiary; for in a policy of this kind the beneficiary is the real party in interest, and the insured cannot defeat her rights by his acts, except in so far as the policy so provides. This principle of law has recently been applied by the Supreme Court of Indiana, in the case of Penn Mutual Life Insurance Company vs. Norcross, where the insured and the Company actually entered into an agreement rescinding the contract. This case has not been published yet in the Indiana Report, but it may be found in 72 N. E., 132.

Counsel refer to the statement in the complaint, that the plaintiff had performed all the conditions of the contract on her part to be performed, and say that this is not true, and has not been proved, for the reason that it has not been shown that all the premiums were paid. This statement in the complaint is based upon Sec. 373 of Burns R. S. of Indiana, 1901, which is as follows:

"In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege gener-

ally that the party performed all the conditions on his part."

This statement refers only to the pleading of the performance of conditions precedent, and since the payment of the premium is not a condition precedent, but a condition subsequent, this statement does not include an allegation of the payment of premium.

Thompson vs. Insurance Co., 104 U. S. 252, at page 260.

Furthermore, under the New York statute, as held by the Court of Appeals of that state, the payment of any premium after the first, is a condition subsequent, and is a matter of defense that must be set up by the Company, together with an allegation of the giving of the statutory notice.

Metropolitan Life Ins. Co. vs. Fischer, 167 N. Y. 178.

POINT VI.

IT IS RESPECTIVELY SUBMITTED THAT THE JUDGMENT SHOULD BE AFFIRMED.

ALBERT J. BEVERIDGE,
LARZ. A. WHITCOMB,
G. K. DENTON,
Of Counsel for the Defendant in Error.

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SUPREME COURT U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

No. ~~214~~ 11.

THE NEDERLAND LIFE INSURANCE COMPANY, LIMITED

Plaintiff in Error

vs.

MARY MEINERT

Defendant in Error

Petition of Mary Meinert

Defendant in Error

for a Rehearing

ALBERT J. BEVERIDGE,
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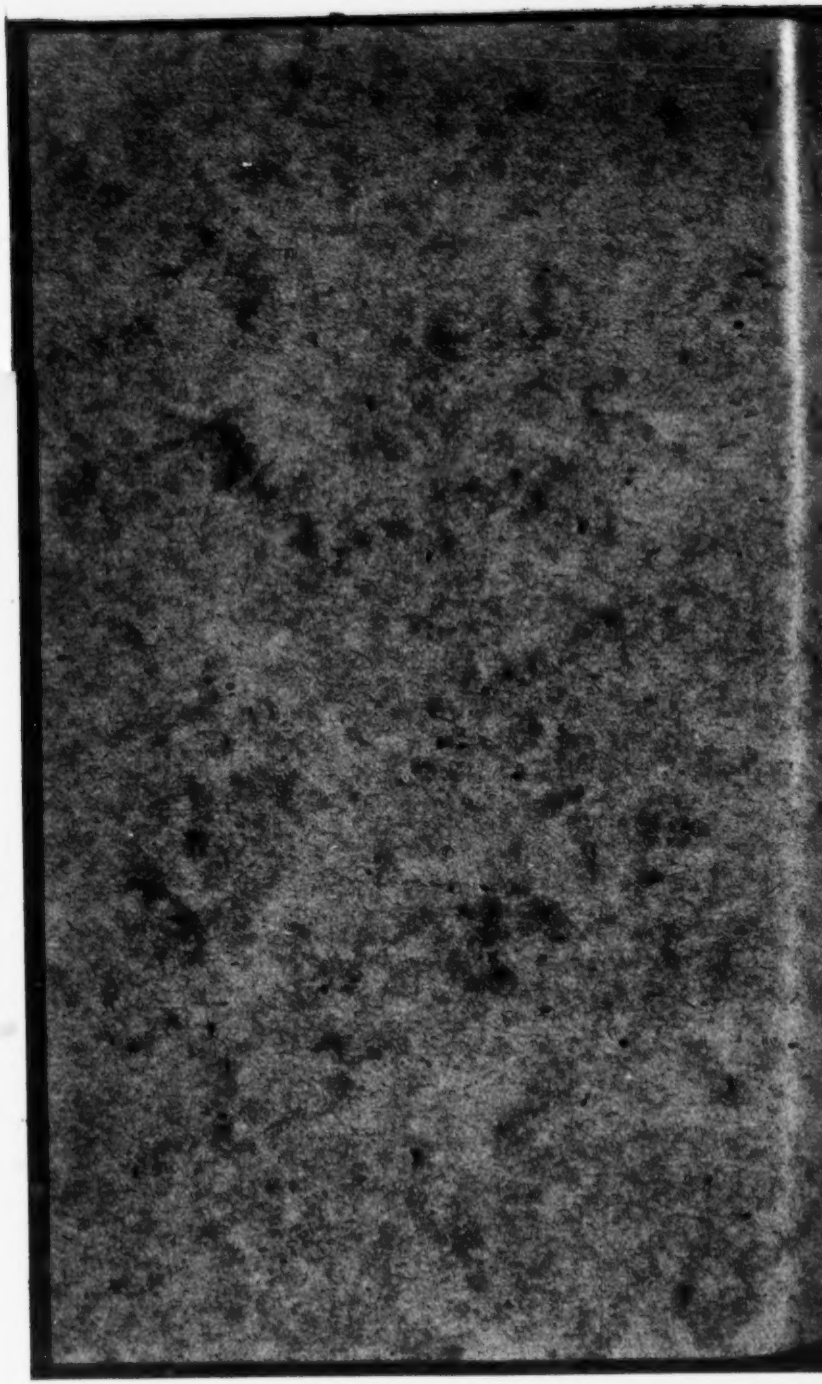

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

THE NEDERLAND LIFE INSURANCE COMPANY, Limited, PLAINTIFF IN ERROR, vs. MARY MEINERT, DEFENDANT IN ERROR.	PETITION OF MARY MEINERT, DEFENDANT IN ERROR, FOR REHEARING.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Mary Meinert, defendant in error, respectfully asks for a rehearing in the above entitled cause for the following reasons:

The question involved is the sufficiency, under the New York statute, of the notice given of the accrual of the premium for non-payment of which a forfeiture is claimed. The premium became due on the 5th day of March, 1897, and the policy provided that on failure to pay any premium within thirty days after it became due the policy should be forfeited. The notice stated that the premium would be due on the 5th day of March, and that the conditions of the policy provided that unless it was paid "by or before that date" the forfeiture would take place. This court held this notice sufficient.

The statute provides that the notice shall state that unless the premium is paid "by or before the day it falls

due" the policy will be forfeited. The question is, therefore, whether or not the notice should state that the policy will be forfeited on the day the premium becomes due, when such is not the case, and when in fact there will not be a forfeiture for thirty days thereafter by the terms of the policy. In other words, where the premium is due on the 5th day of March, but the forfeiture will not take place until thirty days thereafter, to wit: the 5th day of April, for failure to pay the premium, should the notice state that the forfeiture will take place on the 5th day of March, or should it state that the forfeiture will take place thirty days thereafter, on the 5th day of April, if the premium is not paid by that time?

Prior to the decision of this Court in this case it had been held by the Circuit Court of Appeals in the case of New York Life Insurance Company vs. Dingley, 93 Fed. Rep .153, that a notice which failed to state the time when a forfeiture would take place as provided by the contract was insufficient under the New York statute.

The court of appeals of New York had also held, in the case of McDougall vs. The Provident Savings Life Assurance Society, 135 N. Y. 551, that where to follow the language of the statute literally, would be to misstate the conditions of the contract, a notice which followed the conditions of the contract was sufficient. This question being one of considerable importance was for this reason transferred to this court on a petition for a writ of certiorari. It is of considerable importance to insurance companies to know the interpretation of the statute and to know what is a compliance with it. Because of the importance of the question, therefore we think we can safely ask the indulgence of this Court while we present briefly some further reasons why we think the court was in error in the decision rendered.

Let us disregard the failure of the notice to follow the terms of the statute in stating that there will be a forfeiture, and stating instead that the contract provides for a forfeiture on failure to pay the premium on the 5th day of March, and assume that the notice followed the language of the statute in this respect. Our contention is as follows:

First: That even giving the statute a literal interpretation it requires the notice to state that the policy will be forfeited on the day when a forfeiture is provided for by the terms of the contract. It is true the statute says that the notice shall state that unless the premium is paid "by or before the date it falls due" the policy will be forfeited; but the question is, when is the premium due with respect to a forfeiture? Is it not due with respect to a forfeiture on the day when the forfeiture will take place if the premium is not paid? It is true the premium is due on the 5th day of March in the sense that it is payable on or after that time, but since there is no provision for a forfeiture on failure to pay the premium until the 5th day of April, is it not due so far as a forfeiture is concerned on the 5th day of April? Therefore, construing the statute literally does it not necessarily follow that the notice is required to state that a forfeiture will take place on the day when the contract so provides?

Secondly: In United States vs. Crosley, 196 U. S. 327, this court said: "The main purpose of construction is to give effect to the legislative intent as expressed in the act under consideration." See Hackfeld & Co. vs. United States, 197 U. S. 442. In Johnson vs. Southern Pacific Company, 196 U. S. 1, this court said that a literal interpretation would not be given to a statute where such interpretation would evidently be contrary to the intention of the legislature. Therefore, even if the literal interpretation of the statute is not in accordance with our contention, can it be said that the intention of the legislature was that the notice should state something that was not in fact true? Did the legislature intend that the insured should be notified that his policy would be forfeited on the 5th day of March for failure to pay a premium on that day, when such was not the case, and when by the terms of the contract, and in fact, no forfeiture would take place until thirty days thereafter?

In the case of Holy Trinity Church vs. United States, 143 U. S. 457, this court said:

"The language of the act as construed literally evidently leads to an absurd result. If a literal construction of the words of the statute be absurd the act must be

so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." See also Lau Ow Bew vs. United States, 144 U. S. 59, and Collins vs. New Hampshire, 171 U. S. 30. It will be observed that such a notice is distinctly misleading, as pointed out by the Circuit Court of Appeals in this case, and we respectfully submit that it is not to be supposed that the legislature intended that a notice should be given to the insured, the tendency of which would be to mislead him. If the notice merely stated the time when the premium became due, but said nothing about the time when a forfeiture would take place, then while the notice might not be so full and complete as required by the statute, it would at least not be misleading. In such case the insured would naturally refer to his policy to determine when the premium must be paid to avoid a forfeiture. But where the company tells him that a forfeiture will take place at a certain time this throws him off his guard. There is no occasion for him to refer to his policy unless he suspects that the company is not stating the truth to him, and why should he suspect that the company was making a misstatement? If he supposed they were making a mis-statement he would naturally refer to his policy to find out what its terms were. But the insured would naturally suppose that the terms of the policy were as stated by the company and would naturally rely upon such statement without making further investigation. Does it not follow, therefore, that to hold that the legislature intended that such a notice should be given, is to convict the legislature of an absurdity?

Third: Does not the decision of the Court of Appeals of New York, in the case of McDougall vs. The Provident Savings Life Assurance Society, 135 N. Y. 551, cited above, determined this question?

In that case the notice, instead of stating in the language of the statute, that on failure to pay the premium the policy would "become forfeited and void," followed the language of the contract and stated that in order to renew and extend the insurance for another year it would

be necessary to pay the premium as provided by the contract. The policy provided for term insurance from year to year, renewable at the option of the insured at the end of each annual period. The court held in that case, that the notice should not have followed the statute literally, for the reason that to have done so would have been to contradicted the terms of the contract. Is not that the same question involved in this case? Here to follow the language of the statute literally would be to misstate the terms of the contract. Was it not the intention of he legislaure, as held by he Court of Appeals of the State of New York that the notice should follow the contract?

Fourth: We respectfully submit that the ends of justice would be better subserved in the remanding of this case, by directing the lower court to overrule the demurers to the pleadings on which the question here involved arose, and for further proceedings, instead of remanding the case, as the court did, with directions to enter judgment for the defendant. It will readily appear that in view of the ruling of the Circuit Court on the demurrers to the answers of the company it was not necessary for the defendant in error to introduce any evidence. By sustaining the demurrers to the paragraphs of answer in which the notice found by the court to have been given was set up, the court held such notice insufficient. It necessarily, followed, therefore, from the insufficiency of the notice as held by the Circuit Court that the plaintiff was entitled to judgment. If this ruling had not been made by the Circuit Court, the plaintiff could have tendered any other issue she saw fit. She could have raised the question as to whether or not the premium in controversy was in fact paid, and as to whether or not any notice at all was given. There was no necessity, however, for her to go into any of these questions under the law as settled by the Circuit Court in making up the issues. We respectfully submit, therefore, that under these circumstances the ends of justice would be best subserved by remanding the case for further proceedings.

Respectfully submitted,

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LARZ A. WHITCOMB,
G. K. DENTON,
Attorneys for Petitioner.